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New York (State) Reports. Supreme Court.

REPORTS

OF

Cases in Law and Equity

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

BY OLIVER L. BARBOUR,
Counsellor at Law.

VOL. XXVI.

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DURING THE YEAR 1858.

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" 2. HENRY E. DAVIES.†
" 3. THOMAS W. CLERKE.
" 4. JOSIAH SUTHERLAND.
" " DANIEL P. INGRAHAM.

SECOND JUDICIAL DISTRICT.

" 1. JOHN W. BROWN.†
" 2. SELAH B. STRONG.
" 3. JAMES EMOTT.
" 4. JOHN A. LOTT.

THIRD JUDICIAL DISTRICT.

" 1. IRA HARRIS.*
" 2. WILLIAM B. WRIGHT.†
" 3. GEORGE GOULD.
" 4. HENRY HOGEBOOM.

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" 3. ENOCH H. ROSEKRANS.
" 4. PLATT POTTER.

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" 3. WILLIAM F. ALLEN.
" 4. JOSEPH MULLIN.

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" 3. RANSOM BALCOM.
" 4. WILLIAM W. CAMPBELL.

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" 2. HENRY WELLES.†
" 3. ERASMUS DARWIN SMITH.
" 4. THOMAS A. JOHNSON.

EIGHTH JUDICIAL DISTRICT.

" 1. MARTIN GROVER.†
" 2. BENJAMIN F. GREENE.
" 3. RICHARD P. MARVIN.
" 4. NOAH DAVIS, Jun.

* Sitting in the Court of Appeals.
† Presiding Justice.

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CASES

IN

Law and Equity

IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

CHESBROUGH *vs.* THE NEW YORK AND ERIE RAIL ROAD COMPANY.

An agreement to enter into a contract is fulfilled when the contract has been entered into by the parties, pursuant to the terms of the agreement. The original agreement being then *functus officio*, it cannot be made the basis of an action, in connection with the final contract.

And if the complaint, in such an action, avers that the second contract was executed "in lieu" of the first, but fails to show that any important rights had intervened between the making of the two contracts, making it necessary to sue upon the first, all the allegations respecting the original agreement will be stricken out of the complaint, on motion, as being irrelevant and redundant.

A complaint alleging that the plaintiff, at the defendants' request, rendered to them other services, as agent, for which he is entitled to have, as a fair reward, fifty dollars; also for work, labor and services done, and materials furnished by the plaintiff for the defendants, is insufficient, as being indefinite and uncertain.

The objection to a complaint, on this ground, must be taken not by demurrer, but by motion to strike out, or that the complaint be made more certain and definite.

Allen v. *Patterson*, (3 *Seld.* 476,) commented on.

Chesbrough *v.* New York and Erie Rail Road Co.

MOTION to strike out certain parts of the complaint, as irrelevant and redundant, and as to other portions of the complaint, that they be made definite and certain.

Charles Tracy, for the plaintiff.

D. B. Eaton, for the defendants.

PEABODY, J. The plaintiff in his complaint alleges, that on the 8th of May, 1841, an agreement was made between him and his associates on one side, and the defendants on the other side, and was reduced to writing and signed; which provided, in substance that a contract, to the effect therein particularly stated, for the construction of about fifty miles of the defendants' road, should be entered into between the parties thereto, as soon as the same, together with the requisite plans and specifications, could be prepared. A copy of this agreement is set forth in the complaint, which states, with some precision, what was to be the tenor of the contract therein provided for. After setting forth this "memorandum of agreement," the complaint proceeds to state that said agreement "was afterward modified, amended and enlarged by the parties," *and in lieu thereof* "a final contract," under the same date, and ratified and approved by the defendants on the 19th of February, 1842, was executed by the parties; of which last mentioned contract a copy is then set forth in the complaint. No objection is made that the second or final contract is imperfect, or fails fully to express the intent of the parties. The first of these contracts the defendants move to strike out as irrelevant and redundant.

At first view, it seems to be pretty clear that an agreement to enter into a contract is fulfilled when the contract, pursuant to the terms of the agreement, has been entered into and accepted by the parties, and that being so, it is *functus officio*, and cannot be made the basis of an action. That is the case here. The pleading expressly states that the latter or final

contract stipulated for in the original agreement was entered into, and that it was "in lieu" of the former. If so, it supersedes it, and the rights of the parties under the former have been terminated by the fulfillment of it and the substitution of the second in the place of it. But it is argued that the earlier one having preceded the later by some months, rights may have arisen under it which can only be enforced by proceeding on that; and that the final contract, although intended by the parties to cover all the ground covered by the first, may not be as full and comprehensive in all respects; and that the court, on this motion at all events, will not assume that the plaintiff can have no rights under the first, which he has not, to the same extent, and capable of being enforced in a manner equally beneficial, under the second. Perhaps the court would not so decide if the pleadings contained any suggestions of that kind, or were framed with reference to, or even in a manner to admit, such a use of the original agreement. If, for instance, the first agreement were set forth as the basis of an action, and the second one were set out as another ground of action, and breaches of the former as well as the latter were alleged, so that the plaintiff, on the trial, could, under some conceivable state of circumstances, avail himself of the earlier contract, there might be some reason to hesitate. But in this complaint the second is expressly averred to have been given "in lieu" of the first, and this statement, so far from suggesting such a contingency as was named on the argument, and a resort to the earlier contract in case it should arise, or even leaving the plaintiff at liberty to make such a use of it, seems expressly to exclude it; and by declaring that the later was given "in lieu" of the earlier—that is, in the place, room or stead of it—in effect, declares that the earlier one has been removed from the place it occupied between the parties as their contract and the later one installed therein.

If, as is averred, the final contract is given in lieu, or in place of the earlier one, it must supersede and displace it; and unless in some respect it fails of this end, (which we are for-

bidden by the averments in this pleading to presume,) and thus fails to answer the purpose for which it was intended, the instrument thus supplanted is dispensed with, and is not available to the plaintiff as the basis of an action, for it is not a subsisting contract between the parties. The pleading, therefore, shows that the earlier contract being fulfilled and superseded by the second, does not and cannot form the basis of this action, or of any claim; and as it is not otherwise relevant as the pleading now stands, the motion to strike it out must be granted. The plaintiff is at liberty, however, to amend his pleading, with a view to retaining this part of it, if he be so advised.

The causes of action stated in folios 116 and 117 of the complaint, are not stated with sufficient definiteness and certainty. It is sometimes said at the bar, and very eminent judges have said from the bench, that the provisions of the code have been repealed by judicial decision, which has, in effect, reinstated the common counts as used under our former system of pleading. But no mode of pleading as vague and indefinite as is adopted in this case has received the sanction of any court whose decisions are entitled to be regarded as authority here.

At folio 116 the plaintiff says that he, at their request, rendered to the defendants other services, "as agent," for which he is entitled to have, as a fair reward, fifty dollars; and at folio 117, in similar terms, he counts for work, labor and services done, and material furnished by the plaintiff for the defendant. I think there is no authority for such indefiniteness and uncertainty in pleading as this. As to the first of these causes of action no date is given, and the nature of the services is not stated. The subject of the services, the place where, and the subject matter on or respecting which they were rendered, are not, nor is either of them, stated; and without some of these, at least, the defendant is not sufficiently notified of the nature of the claim to enable him either to answer or prepare for trial intelligently. I do not say that the omission

of each of these is itself conclusive against the sufficiency of the pleading; on the contrary, some of them might probably be dispensed with, or stated generally, and still leave the pleading sufficient, if the others were fully and particularly stated. The services might, I presume, be sufficiently designated to inform the defendant of the cause of action without a statement of all these particulars, but some of them certainly should be given. Some description or designation of the services for which compensation is claimed, the defendant certainly has a right to demand. As it now stands, any kind of services "as agent," respecting any subject matter, at any time, at any place, comes within the terms of the allegation, so general and indefinite is the language of the complaint; and may be proved under it.

The fifth cause of action, at folio 117, is stated, if possible, even more vaguely than the one last referred to. In this the claim is for work, labor and materials furnished; and it does not even designate the time, place or character of either, at all, in any one respect; not even as far as the last, in which the plaintiff does say that the services therein mentioned were rendered "as agent."

The sixth cause of action is stated to be for money "expended in the payment of fees and charges of the sheriff," $535, "on or about the 1st of January, 1843." What fees and charges of the sheriff? Fees and charges of what sheriff? Fees and charges of the sheriff for what? If for services, for what services of the sheriff? In what business? When rendered? Where rendered? To what sheriff paid?

In the absence of further information on the subject, the defendant can ascertain what may be intended by searching through all past time for all bills and charges of any and all sheriffs, for services in any and all causes: and if he find a payment made, or a debt of the kind, originally due by the defendant or any one else, which may have been paid by the plaintiff on or about the 1st of January, 1843, (this date of the payment being the only matter of description vouchsafed

to him,) he will find what may possibly furnish a clue to the payment referred to: and the plaintiff, on the trial, under this pleading, would only be limited to the same ample boundaries in his proofs. This, although less objectionable than the statement of the two preceding causes, is, nevertheless, by no means definite or certain and should be reformed. As to these, the complaint should be made more definite and certain.

And now what is the case at whose door the sins of loose pleading like this are laid, as being authorized by it? *Allen* v. *Patterson*, (3 *Selden*, 476.) That action was brought to recover for goods sold and delivered, the sum being due on account. The complaint, besides the fact of sale, states, first the place of the sale and delivery, "the city of Buffalo in said county of Erie;" second, the date of it, "the first day of May, 1849;" third, the parties to it, "by the plaintiff to the defendant;" fourth, the amount of it, "$371.01;" and that said sum was then due, that is, that the term of credit (if any) had expired. The items of the account are not given, to be sure, but the code expressly provides that they need not be given in a pleading.

These are all the material facts necessary to be stated under any system of pleading of which we have had any practical knowledge; and they all appear fully in the complaint in that much abused case. It is true, that they are not stated in the manner and style of averment which might best accord with the taste of a fastidious pleader under our code; but they are intelligibly and fully stated, nevertheless, and plainly appear in the report of the case. The pleading would have been more complete, if it had stated whether the price claimed was fixed by contract between the parties, or, in the absence of a contract, was claimed as the value of the goods. This is done in effect, however; for no contract as to the price is alleged; and the claim of that sum specified as the price or sum due for them, without stating that there was a contract for it, is, in effect, claiming it as the value, and not as the contract price of them. So it would have been better, perhaps, to state

whether the sale was for cash or credit, and if on credit on what credit and when it expired, instead of stating merely that the sum was due: but the pleading was good without it.

The objection in that case, moreover, was taken by demurrer, and the ground stated was that the complaint did not state facts sufficient to constitute a cause of action.

Defects of pleading, like those urged on this motion, are not properly grounds of demurrer, even when they plainly appear; and the decision in that case, that the pleading was good, on that demurrer, by no means establishes its completeness, tested by a motion of this kind.

Mere indefiniteness and uncertainty are never proper grounds of demurrer under our rules of pleading, and especially are they not grounds for one like this, in its nature a general demurrer. A pleading may state facts sufficient to constitute a cause of action, and still these facts may be stated in a manner very unsatisfactory and not definite or certain—the standard required by our practice.

The mode of pleading adopted in this case, indeed, defective as it manifestly is, might very possibly be held sufficient on a general demurrer, when the question would be, whether the facts stated were in themselves sufficient to constitute a cause of action; and not whether they were stated with sufficient definiteness and certainty to give the defendant all the information he had a right to, and to limit the plaintiff in his proofs to the particular cause of action described, and thus satisfy the requirements of our system of pleading, as to manner and fullness of statement.

This motion relates to the mode of stating the facts; the demurrer to the sufficiency of the facts stated to constitute a cause of action. Each remedy has its peculiar duties and functions, and is proper only in its own place, and neither can properly take the place of the other.

That case, therefore, does not decide that the pleading there examined was sufficiently definite and certain; and if it did, it would still fall far short of what is constantly imputed

to it as authorizing laxity and vagueness; for that pleading compared with the one we are considering, or with those it is frequently invoked to sustain, is *both definite and certain.*

The form of statement is, to be sure, somewhat like that once used in what were called the common counts; but the facts are stated much more fully, and with reasonable definiteness and certainty. On the subject of the standard of definiteness and certainty required in pleading, that case decides nothing and is not an authority at all; and on the subject of the sufficiency of pleading in matter of substance, which is the only question raised there, it decides nothing new in principle.

[New York Special Term, February 2, 1857. *Peabody*, Justice.]

James Monroe, John A. Monroe and Joseph Blunt *vs.* E. C. Delavan, J. T. Norton and B. Tibbitts.

In 1847 T. obtained a judgment against B. and others, on a note given by them to D. for about $2800. That note, as alleged, was obtained from the makers by D., by fraudulent representations, which rendered the same void; and in order to prevent an inquiry into the consideration, D., together with N. who had some interest in the note, induced T. to allow the same to be prosecuted in his name, without his having any interest in such note or judgment. The defendants in that suit did not become aware of the fraud, and the want of interest on the part of T., until after the recovery of the judgment. In 1838 T. filed a creditor's bill upon the judgment. In his answer to that bill B. set up the said fraudulent representations of D. as a defense; and after a hearing of the parties the court allowed the defense, and made a decree dismissing the bill with costs. B. then brought this suit, to have the judgment canceled of record, and for a perpetual injunction, and M. and M. his assignees, under an assignment for the benefit of creditors, joined in the suit. *Held*, on demurrer to a complaint stating these facts, that the question of fraud, having been decided in the creditor's suit, was *res adjudicata* as between B. and D., that suit having been prosecuted for the benefit of D.; and that T., the nominal plaintiff, was also bound by the decree in that suit.

Held further, that the claim on the judgment having been, by the decree in the creditor's suit, adjudged to be liable to the defense of fraud there set up, the defendants in this suit were bound to show cause why the judgment

should not be canceled. And that there had been no laches on the part of the plaintiffs in applying for relief.

Held also that the suit was properly brought by the plaintiffs; that B. himself might bring it, he being interested in having the judgment canceled; and that his assignees might bring it, as representing the assigned property, on the title to which the judgment was a cloud, and generally as representing the rights of other creditors of B. in the fund assigned. And that it was proper for B. and his assignees to unite as plaintiffs. Demurrer overruled, and judgment for plaintiffs.

APPEAL by the plaintiffs, from an order made at a special term, allowing a demurrer to the complaint, and ordering judgment for the defendants.

The complaint stated that, in 1847, B. Tibbitts, one of the above defendants, recovered a judgment in the supreme court against Richard R. Ward, Samuel Glover and Joseph Blunt, for $2819.12, and that on the 3d of April, 1848, he filed a creditor's bill to enforce the said judgment against the same parties. It also stated that the consideration of the said judgment was a promissory note, obtained by Edward C. Delavan from the same parties by fraudulent representations; and that in order to prevent an inquiry into the consideration, he and John T. Norton, who had some interest therein, induced Tibbitts to allow the same to be prosecuted in his name, without his having any interest in said note or judgment. It further alleged that the defendants did not become aware of the fraud and the want of interest on the part of Tibbitts until after the recovery of the judgment, and that when they did know those facts, the said Joseph set them up in his answer to the creditor's bill; and after hearing of both parties, a decree was made in the supreme court, February 4, 1854, dismissing the bill with costs; which decree stands unreversed. James Monroe and John A. Monroe joined in the present complaint, as assignees of real estate belonging to the said Joseph, on which said judgment was a lien, and the plaintiffs prayed that the judgment might be canceled of record, and for a perpetual injunction. To this complaint the defendants demurred generally.

Wm. Curtis Noyes, for the appellants. I. If the defendant Tibbitts should seek to enforce the original judgment, the facts established by the decree in the suit heretofore brought to enforce that judgment would be a good bar to his action. (*Simpson* v. *Hart*, 1 *John. Ch. Rep.* 91. *Manny* v. *Harris*, 2 *John.* 24. *Kingsland* v. *Spalding*, 3 *Barb. Ch.* 341, *Etheridge* v. *Osborn*, 12 *Wend.* 399. *Gardner* v. *Buckbee*, 3 *Cowen*, 120. *Bouchard* v. *Dias*, 3 *Denio*, 238. *Ehle* v. *Bingham*, 7 *Barb.* 494. *Holmes* v. *Remsen*, 7 *John. Ch.* 286.)

II. The complaint shows that the fraud came to the knowledge of the defendants after the recovery of said judgment, viz. in February, 1848, and equity will give relief in such case. (*Lansing* v. *Eddy*, 1 *John. Ch.* 49. *Foster* v. *Wood*, 6 *id.* 87. *Bruen* v. *Hone*, 2 *Barb. S. C. Rep.* 586. *Borden* v. *Fitch*, 15 *John.* 121. *Reigal* v. *Wood*, 1 *John. Ch.* 402. *Huggins* v. *King*, 3 *Barb. S. C. Rep.* 616.)

III. There have been no laches; as the very question in issue in this action came up in a suit commenced in April, 1848, by Tibbitts against the defendants, which suit was not decided until February, 1854, establishing the fraud.

IV. After that decision, Tibbitts and those he represents are concluded on the questions brought in issue in that suit; and the plaintiffs now seek to remove the obstacle that the judgment makes to the disposition of the real estate on which it is a lien.

V. Any party having an interest may, upon proper grounds, apply by bill in equity to set aside a judgment, or to obtain a perpetual injunction against its enforcement.

VI. The judgment and decree in the former suit was upon bill and answer, and not upon the plea, and the decree was after a hearing of both parties.

VII. The judgment and decree against Tibbitts is also a bar against Delavan and Norton. (*Southgate* v. *Montgomery*, 1 *Paige*, 41. *Gelston* v. *Hoyt*, 13 *John.* 561. *Calkins* v. *Allerton*, 3 *Barb.* 171. *Rapelye* v. *Prince*, 4 *Hill*, 119.)

VIII. The judgment was a *cloud* upon the title of the as-

signees, embarrassing them in the execution of their duties as trustees, and requiring parol and *other extrinsic* evidence to show its invalidity. The parol and extrinsic evidence is: 1. That the note was given for the land; 2. That the false representation was made; 3. That Tibbitts did not own the note; 4. As against Delavan, that he was the *real* owner; 5. That the fraud was discovered *after* the recovery of the judgment. (*Van Doren* v. *Mayor of New York*, 9 *Paige*, 388. 3 *A. K. Marsh.* 338.)

IX. It was invalid, and did not constitute a legal claim against the funds in the hands of the plaintiffs, as such trustees, nor entitle Tibbitts to a dividend; because, (1.) The note on which it was obtained was void for fraud and want of consideration, growing out of the false representation made in selling the property. (2 *Bailey*, 324. *Cooke*, 394.) (2.) By reason of the decree or judgment of the supreme court, adjudging that Tibbitts was not entitled to recover upon it, and that it formed no foundation for a creditor's bill.

X. The Monroes, as trustees for the benefit of creditors, represent them all, and may maintain this action to cancel the judgment and remove the cloud from their title; it being, practically, a suit for directions to them in discharge of their duties as such trustees, which they cannot perform without such directions; they having been notified by the other creditors not to pay the judgment. (*Hill on Trustees*, 542, 2*d ed.* *Pratt* v. *Adams*, 7 *Paige*, 615.)

H. Harris, for the defendants.

By the Court, PEABODY, J. The plaintiffs in their complaint say, that in August, 1847, the defendant Tibbitts obtained a judgment against the plaintiff Blunt, and two others, on a note given by them to Delavan, for about $2800. That in April, 1848, Tibbitts filed a bill in chancery to enforce said judgment, to which Blunt set up as a defense that the note on which the judgment had been recovered was made and delivered to Delavan

to procure the release of Blunt from a contract he had made with Delavan, which he had been induced to make by fraudulent representations of said Delavan. The fraudulent representations were set out in the complaint, and it is also stated that said fraud was not discovered until after the judgment had been recovered. It is also stated that the judgment in fact belonged to said Delavan. That judgment in that second suit, brought to enforce the judgment recovered in the first, was entered for the defendant Blunt, in February, 1854, to the effect that the answer was true, and dismissing the complaint with costs; from which no appeal has been taken. The plaintiffs also say that Blunt, in July, 1848, made to the plaintiff James Monroe a general assignment of his property, for the benefit of creditors; and they demand, as relief, that the judgment against Blunt be canceled or opened, and that a perpetual injunction be granted against the collection of it, and other general relief. The complaint, after stating the fraud by which the defendant Blunt was entrapped, proceeds to state that the question of fraud on the part of Delavan has been decided in a suit, the substance of which is set forth; from which it appears that it has become *res adjudicata* between Blunt and Delavan. The suit in which it was decided was, to be sure, between Tibbitts and Blunt, but the court decided that it was prosecuted in the name of Tibbitts for the benefit of Delavan; and by rendering judgment for the defendant in that suit, for a cause which was matter of defense only between Blunt and Delavan, it is certain that they must have decided that the judgment, in the hands of Tibbitts, was subject to that matter of defense, which is all that is necessary for the plaintiff in this case. Tibbitts was plaintiff in the suit in which the judgment was recovered. He was also plaintiff in the suit brought to enforce it; and whether Delavan was the real plaintiff in interest or not, he, as well as the nominal plaintiff, was bound by the adjudication there had, not only as to the result of that suit, but also as an adjudication of the rights of the owner of the judgment, whether he or Tibbitts were that owner.

which concludes him not only in that suit but elsewhere. (*Southgate* v. *Montgomery*, 1 *Paige*, 41. *Calkins* v. *Allerton*, 3 *Barb.* 171. 7 *id.* 494. 4 *Hill*, 119.) The defense to the claim on the note is adjudged to be good and sufficient in law, and a court of equity in a direct proceeding by the plaintiff on the judgment, against the judgment debtor, having adjudged to that effect has dismissed with costs, on that ground, a bill to enforce it. This decision involved the decision of several minor questions: (1st.) That the matter set up as constituting fraud was sufficient in law to have defeated the recovery; (2d.) That the fraudulent representations were made; (3d.) That the evidence was discovered after the judgment against Blunt was recovered, and too late to be interposed as a defense in that suit; (4th.) That no unreasonable delay had been suffered by Blunt, after the discovery of the fraud, in availing himself of it; and (5th.) That the relations between Tibbitts and Delavan were such that the fraud was available to defeat the claim when made by Tibbitts, as it would have been if it had been made by Delavan. Whether this last point was so found on the ground that the suit was prosecuted by Delavan in the name of Tibbitts, or on some other ground, is not important. It is sufficient that the claim on the judgment was adjudged to be liable to this defense, in the hands of Tibbitts. With those matters judicially ascertained we may look to the defendants to show cause why the judgment should not be canceled. Their demurrer is general, that the complaint "does not state facts sufficient to constitute a cause of action" against them, and they have not indicated by points what are the grounds on which they rely to sustain it. Nor is there before us any reason by way of opinion or otherwise for the decision in the court below, allowing the demurrer. The length of time that was suffered to elapse after the discovery of the fraud, before the attempt by Blunt to avail himself of it, to accomplish the end sought by this suit, to wit, the cancellation and extinguishment of the judgment, may be a sufficient ground in their estimation, and it

would be in ours, perhaps, but for the fact that he did, immediately on the discovery of it, commence to assert it legally, to defeat the claim on the judgment. The suit on the judgment was commenced in April, 1848, and in that suit this new matter was set up as a defense. That defense was litigated till the 4th of February, 1854. The existence of the facts, and their sufficiency in law to defeat the claim, were then being litigated throughout that time, and those questions were in doubt until the decision in that case. The question arises whether, under those circumstances, laches can be imputed to Blunt in omitting to bring this suit until after the decision in that. The whole matter of law and fact was then in issue between the same parties in that suit. To have commenced this action would have done no good, apparently, and would have increased litigation and expense. The result in the suit first decided would have concluded the parties in the other, and rendered the whole question *res adjudicata*. The defendants here cannot suffer any damage which might otherwise follow from the lapse of time, such as the loss and fading out of evidence: for the question was immediately litigated between the parties, and the evidence could have been, and so far as we can see was, immediately called into the case, and not only put in a condition to be preserved, but the result of it was actually obtained by an adjudication which is now entirely available here; and whatever it might have been, would be available to either party conclusively in this suit, or any other brought for the same purpose. Under these circumstances, the defendants cannot complain of delay in commencing this suit. Indeed, it is very doubtful if a court of equity would have allowed the two suits to proceed together, the questions to be tried in the two being the same, and between the same parties. It would probably have restrained the proceedings in one until the decision in the other should have been attained; and if a suit had been brought by Mr. Blunt, that would probably have been the one to be restrained; certainly it would if it had been commenced after the other, which it might have

been, without the least danger that the plaintiff could suffer on the ground of laches, as to it. This suit is properly brought by the plaintiffs. Blunt himself might bring it. He is interested in having the judgment canceled. The Monroes might, if not as representing the rights of Blunt, certainly as representing the property on the title to which the judgment was a cloud, and generally as representing the rights of other creditors of Blunt to the fund assigned, between whom and the owner of the judgment in question that fund was to be distributed, and the shares of the *cestuis que trust* whose interests they were bound to protect be thereby diminished; and they may unite as plaintiffs, I think, at any rate, without exposing themselves to harm from a demurrer. The judgment below should be reversed, and judgment entered for the plaintiffs in this suit, with costs.

[New York General Term, November 2, 1857. *Mitchell, Clerke* and *Peabody*, Justices.]

The Central Bank *vs.* The Empire Stone Dressing Company and Shelton.

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116a 292

A manufacturing corporation is not authorized, by virtue of its general powers, to indorse, for the accommodation of another, paper in which it is not interested; such a transaction not being within the scope of the business for which it was constituted, and in which alone it is empowered to act.

Nor can it empower any officer or agent to act for it, in indorsing such paper.

The secretary of a corporation has no power to indorse accommodation paper, under his general authority to indorse notes and bills "in the prosecution of its business."

But if a loan, although in form made to the president of a corporation, individually, who gives his own note for the amount, indorsed by the corporation, is in fact made to the corporation itself and for its benefit; or if the lender is induced by the representations of the agent of the corporation, to believe that the transaction is with the corporation and for a purpose within the scope of its business, the corporation is liable upon its indorsement.

Central Bank *v.* Empire Stone Dressing Co.

The repeal of the act of the legislature, prohibiting the circulation of bank notes of a denomination less than five dollars, repealed, also, the consequences of the act in respect to contracts entered into while it was in force.

Contracts made while the prohibitory law was in force, whose consideration was always morally good, as between the parties, are therefore now without the legal impediment of being contrary to legally established public policy, and are valid.

A foreign banking corporation is to be presumed to possess the power to enter into a contract with a borrower, to keep its notes in circulation, by redeeming them as they are from time to time offered for redemption.

APPEAL from a judgment rendered at a special term. The complaint alleged that the plaintiff was "a corporation, carrying on the business of banking in Middletown, Connecticut, and was duly incorporated for that purpose by an act" of the legislature of Connecticut. That the defendant Shelton made his promissory note for $5127, dated New York, May 8th, 1854, at six months, payable to the order of the Empire Stone Dressing Company, at, &c.; and that thereupon the said stone dressing company, a corporation organized for the purpose of stone cutting, sawing and dressing, under the general act of February 17, 1848, duly indorsed the same; and said note, before the maturity thereof, was, for value received, delivered to the plaintiff. The note, when due, was duly demanded, &c., of which the said company had due notice. A like claim on a like note for $6180.66, dated May 4, 1854, at seven months. The answer admits the plaintiff to be a foreign corporation, as alleged. It is then alleged that before May 4, 1854, the plaintiff made an unlawful contract with said Shelton to advance him bank bills of the plaintiff under the denomination of *five* dollars, with intent and for the purpose of circulating the same in the state of New York; and pursuant thereto, &c. did advance to said Shelton within this state such bills with intent, &c. Shelton agreed to and did circulate the same within this state. That in consideration, &c., and to secure the plaintiff, said two notes were made, and which, being founded on an illegal consideration, are void. It is denied that the defendants indorsed, or author-

ized the indorsement of, said notes. It is also denied that the stone dressing company ever held said notes, or that they were indorsed in the regular course of its business. The case was tried before Judge ROOSEVELT, at the New York circuit, in June, 1856. The indorsement was proved to be in the handwriting of George Sherman. The plaintiff proved that said Sherman was chosen secretary and treasurer of the company on the 6th of December, 1853. By the by-laws, the secretary was empowered to "make, draw, indorse and accept notes and bills of exchange" "in the prosecution of" the business of the company. Notice of non-payment, &c. was proved, and the plaintiff rested. Motion by the counsel of the company to dismiss the complaint, on the ground that it was not proved the notes were indorsed by Sherman in the prosecution of the business of the company, nor was he authorized to indorse them. Motion denied, and exception. Evidence was given of an agreement made in April, 1852, between Shelton, who was a resident of New York, and the bank, by which the latter agreed to supply him with bills of said bank, which were marked, to distinguish them from other bills, and which were to be circulated by Shelton in New York; and, when redeemed by the plaintiff, were to be sent to Shelton again for further use, and so from time to time Shelton providing funds to meet what was paid in redeeming the bills, &c. The bank was to be made secure by the note of Shelton, indorsed by the stone dressing company, and such a note of the date of said agreement (27th April, 1852) was given. This agreement was performed by the bank furnishing its bills, some over and some *under* five dollars; and which were used by Shelton, and when redeemed by the plaintiff were again sent to Shelton for further use. When the note first given fell due, it was renewed by a similar one. Thus the arrangement went on, the note in suit for $5127 being the last renewal of the series. The other note in suit for $6180.66 was given on such an arrangement, in all respects, except that there was included in it a balance due

from Shelton to the bank ($915) on other transactions. Shelton testified that Sherman indorsed the notes at his request. No part of the money was used for the stone company, but the arrangement was for the business of Shelton alone. Shelton was president of the company when the arrangements were first made, but not when the notes in suit were given. The defendants' counsel renewed the motion to dismiss the complaint, on the former ground, and on the ground that the legal capacity of the plaintiff to make such a contract as that which formed the consideration of the notes had not been proved, and could not be inferred as incident to the incorporation of the plaintiffs for banking purposes. Motion denied, and exception. The defendants' counsel requested the judge to charge—(1.) If the notes were indorsed without authority, or in a business, or for a purpose, foreign to that for which the company was incorporated, the defendants are not liable. (2.) If the indorsements were made merely for the benefit and accommodation of Shelton, the plaintiff cannot recover. (3.) The agreement between the plaintiff and Shelton for the circulation of notes in this state was illegal. (4.) If the plaintiff knew of Shelton's intention to circulate the bills under five dollars in this state, and did any act in furtherance of it, the notes given for the bills are void. The court refused, but charged, among other things, that although the circulation of the bills of banks out of the state, under five dollars, was once prohibited by statute, yet its repeal canceled all penalties and forfeitures not yet exacted, and rendered null any defence which would operate as such penalty or forfeiture. It was immaterial therefore whether the agreement on which the defendants alleged the notes were given, was for the circulation in this state of bank bills under five dollars or not. The defendants' counsel excepted; also to the refusal of the judge to charge as requested. The court charged that the secretary was authorized to "indorse notes in the prosecution of the business of the company," and if he abused that authority, the company would still be liable

if the paper was received *bona fide* and for value. That if a private debt of Shelton's to the plaintiff was included in the notes of Shelton, that would not render the notes void, but the amount might be deducted. To each of these points the defendant excepted. Verdict for the plaintiff. A motion was made to set the verdict aside, but it was denied by the special term, and judgment was given for the plaintiff.

S. Beardsley and *Charles F. Sanford*, for the appellants. I. The verdict was not only unsupported by, but was contrary to, the evidence.

II. The motion to dismiss the complaint should have been granted. Sherman, who made the indorsement in the name of the stone dressing company, was their secretary, and his only authority was to indorse in the name of the company, *in the prosecution of its business.* But this indorsement was not *in the prosecution of* any such business; it was made for the accommodation of Shelton alone, as the plaintiff well knew. (1 *R. S.* 599. *Talmadge* v. *Pell*, 3 *Seld.* 328. *Bank of Genesee* v. *Patchin Bank*, 3 *Kern.* 314. *Alexander* v. *Mackenzie*, 6 *M., Gr. & Sc.* 766. *Nixon* v. *Palmer*, 4 *Seld.* 398. *Attwood* v. *Munnings*, 7 *B. & Cres.* 278. *Mechanics' Bank* v. *N. Y. and New Haven Rail Road Co.*, 3 *Kern.* 599.)

III. It was not proved that the plaintiff, a foreign banking corporation, had any *legal capacity* to make such a contract as that which formed the consideration of the notes in suit; and that it had such capacity could not be inferred from the fact that it was a banking corporation. The court erred in refusing to dismiss the complaint on this ground. (*Phenix Bank* v. *Curtis*, 14 *Conn. Rep.* 437, 440. *Regulae Generales, Id.* 140. *N. H. Steamboat Co.* v. *Vanderbilt*, 16 *id.* 421. *Rules of Practice* 5, 18 *id.* 557. *Wolf* v. *Goddard*, 9 *Watts*, 555.)

IV. The judge erred in charging the jury that the repeal of the act, which prohibited the circulation of foreign bank bills *under five* dollars, after the contract between Shelton and the bank had been made, and the notes in suit given pursuant

to said contract, made said notes, although illegal before, perfectly legal then, and their former illegality could not be set up as a defense to an action on them. (*Laws of* 1830, *p.* 357, *act prohibiting foreign bills under* $5. *Laws of* 1855, *p.* 137, *repealing act, March* 27, 1855. *Hitchcock* v. *Way*, 6 *Adol. & El.* 948. *Jaynes* v. *Wilty*, 1 *H. Bl.* 65. *Dash* v. *Van Kleeck*, 7 *John.* 477. *Butler* v. *Palmer*, 1 *Hill*, 324. *Sayre* v. *Wisner*, 8 *Wend.* 661. *Bailey* v. *Mogg*, 4 *Denio*, 60. *Marsh* v. *Higgins*, 9 *M., Gr. & S.* 551. *Moore* v. *Durden*, 2 *Exc.* 22.)

V. The court erred in refusing to charge as requested; also in charging upon the points excepted to. (*Mechanics' Bank* v. *N. Y. & N. Haven R. R. Co.*, 3 *Kern.* 599. *Rose* v. *Truax*, 21 *Barb.* 361. *Burt* v. *Place*, 6 *Cowen*, 431. *Mackie* v. *Cairns*, 5 *id.* 548, 580. *Barton* v. *Port Jackson &c. Plank Road Co.*, 17 *Barb.* 397. *Bank of Genesee* v. *Patchin Bank, cited above.*)

M. S. Bidwell, for the plaintiffs. I. There was no error in the refusal of the judge to dismiss the complaint. There was evidence for the consideration of the jury. (1.) There was evidence from which the jury might find that the notes were indorsed by the authority of the appellants. Sherman was secretary and treasurer of the company, and had *prima facie* authority to indorse their name. Shelton was president of the company, and was the owner of a large plurality of stock, and he represented that the note was indorsed by the company, and that the bank bills obtained for it were to be disbursed in the regular business of the company. It was so stated in the agreement, which the appellants introduced in evidence. And it was so stated or assumed in other evidence, which the appellants also introduced. The name of the appellants had been used by Shelton in these or similar transactions with the respondents, with the knowledge of the trustees of the company, and without their objection. Shelton himself testified that such notes *were* made by the *company*. (2.) Shelton's

character for veracity was impeached; it was for the jury to pass upon his credibility. There was evidence, therefore, proper to be left to the jury. (3.) It is immaterial whether the *first* refusal to dismiss the complaint was right, if there was evidence for the jury at the conclusion of the testimony. (*Murray* v. *Judah*, 6 *Cowen*, 490. *Hart* v. *Rensselaer and Saratoga R. R. Co.*, 4 *Selden*, 42. *Grah. Pr.* 325.) The notes were valid, and constituted a cause of action upon which a suit was maintainable in this court. The validity of the notes depends upon the law of Connecticut, where the contract was made. The *lex loci contractus* applies to it. (2 *Kent's Com.* 454. *Pratt* v. *Adams*, 7 *Paige*, 632. *Peck* v. *Mayo*, 14 *Verm. R.* 33. *Depau* v. *Humphreys*, 20 *Mart. Louis. R.* 1. *Pomeroy* v. *Ainsworth*, 22 *Barb.* 123–129. *Chapman* v. *Robertson*, 6 *Paige*, 627.) The court cannot presume that any law existed in that state prohibiting such a contract; on the contrary, it is to be presumed that the common law is in force there. (*Thompson* v. *Ketchum*, 8 *John.* 193. *Pomeroy* v. *Ainsworth*, 22 *Barb.* 129. *Holmes* v. *Broughton*, 10 *Wend.* 78. *Shepherd* v. *Nabors*, 6 *Ala. R.* 631. *Titus* v. *Scantling*, 4 *Black. R.* 89. *Mali* v. *Roberts*, 3 *Esp. R.* 163. 2 *Cowen & Hill's Notes*, 1138.) The party affirming that there is such a law must prove it. As there was no such proof, it must be taken to have been a valid contract in Connecticut. The appellants are not subject to our law and are not supposed to have knowledge of our statute law, which, to them, is a foreign law: such laws are presumed not to be known to them until proved like any other facts. (*Brackett* v. *Norton*, 4 *Conn. R.* 520, 521. *Hempstead* v. *Reed*, 6 *id.* 480, 486. *Biggs* v. *Lawrence*, 3 *T. R.* 456, 457.) The maxim, *ignorantia legis non excusat*, does not apply; but the co-relative maxim, *ignorantia facti excusat*, is applicable. The case is within the principle of decisions under the usury law, where a plaintiff, ignorant of the violation of that law, has been held entitled to recover. (*Holmes* v. *Williams*, 10 *Paige*, 326, 333. *Aldrich* v. *Rey-*

nolds, 1 *Barb. Ch. R.* 43. *Jackson* v. *Colden*, 4 *Cowen*, 266. *Ramsay* v. *Clark*, 4 *Humph. R.* 244. *Taylor* v. *Bunce*, 1 *Virg.* (*Gilm.*) *R.* 42. *Law* v. *Sutherland*, 5 *Gratt. R.* 357, 360, 366. *Smith* v. *Beach*, 3 *Day's R.* 268. *Middletown Bank* v. *Jerome*, 18 *Conn. R.* 450. *Murray* v. *Harding*, 3 *Wils. R.* 395, 396. *Davison* v. *Franklyn*, 1 *B. & Ad. R.* 142.) The respondents had reason to believe it was not contrary to our law; the representations and conduct of the appellants' own confidential officers gave them good reason to believe so. The parties are not *in pari delicto*. The appellants are presumed to have known our law, and are therefore answerable for its transgression. (*Best on Prec.* 63; 31 *Law Lib. N. S.*) But this is not the case of the respondents. (*Skaiffe* v. *Jackson*, 3 *B. & C.* 421.) The appellants were bound to notify the respondents, otherwise they cannot avail themselves of the fact of such a law to defeat the action. Their silence is a waiver of their right to set up such a defense. (1 *Story's Eq. Jur.* §§ 385 *and* 439. 1 *Mad. Ch. Prac.* 262, 263. 1 *Fonb. Eq. Jur.* 388, 389. *Picard* v. *Sears*, 6 *Ad. & El.* 474. *Town* v. *Needham*, 3 *Paige*, 555.) 1 *Cowen & Hill's Notes*, 204. *Fanning* v. *Dunham*, 5 *John. Ch.* 145.) It would be contrary to public policy as well as to good morals to sustain such a defense; it would encourage persons to lead others to violate the law; it would encourage violations of our law. The legislature never intended that such an effect should be given to the law. (*Sanders* v. *Kentish*, 8 *T. R.* 165.) But if the respondents had resided here, and the contract had been made here, the defense could not have been sustained. The statute prohibiting the circulation of small bills of the banks of other states is not in force; there is not any such statute. It did not, when it existed, declare securities given upon such contracts void. The repeal of the statute is a repudiation and condemnation of its policy. It must be considered as if it had *never* existed. (*Butler* v. *Palmer*, 1 *Hill's R.* 324. *James* v. *Dubois*, 1 *Harrison's New Jersey R.* 301.) All prosecu-

cutions pending under such a law, whether civil or criminal, fall the instant it is repealed, and cease, *ipso facto*, to be sustainable. (*Butler* v. *Palmer*, 1 *Hill's R.* 324. *Lewis* v. *Foster*, 1 *N. H. R.* 61.) By parity of reasoning, every defense depending upon such statute must fall, upon its repeal, and cease, *ipso facto*, to be sustainable. This will do no injustice. It will not deprive the appellants of any vested right. They had no vested right to set up a dishonest defense, any more than the inhabitants of Gad's Hill could set up a prescriptive right to commit robbery. (2 *Leon. R.* 12.) The contract was not void: the law recognizes the duty and obligation of the debtor in such cases to pay, although from considerations of public policy courts will not enforce such a contract directly by action. Even in cases of usury, when the contract is expressly declared to be void, our jurisprudence recognizes such an obligation on the part of the debtor. (*Fanning* v. *Dunham*, 5 *John. Ch.* 142, 146. *Rogers* v. *Rathbun*, 1 *id.* 367. *Murray* v. *Sands*, *Selden's Decisions of Court of Appeals*, *Oct.* 1853, *p.* 3, *cited* 17 *Barb.* 350. *Curtis* v. *Leavitt*, 17 *Barb.* 309. *Andrews* v. *Russell*, 7 *Black.* 474. *Hill* v. *Smith*, 1 *Morris' R.* 70.) *A fortiori* it will do so when the contract is not declared to be void. The respondents had capacity to make the contract and to take the note. The appellants are estopped to deny it. The appellants must pay for the property of the respondents, or restore it. There was no evidence of the respondents' want of capacity.

II. The exceptions to the charge of the judge cannot be sustained. (1.) As the appellants excepted to the *entire charge*, the exception must be overruled if *any part* of the charge was not erroneous. (*Haggart* v. *Morgan*, 1 *Seld.* 427, 428. *Caw* v. *Robertson*, *Id.* 125, 132. *Hunt* v. *Maybee*, 3 *id.* 273, 274. *Davenport* v. *Covert*, *Ct. of App. Oct.* 1852.) (2.) No part of it was erroneous. The part which will be objected to was a mere abstract proposition. If not regarded as a mere abstract proposition, but taken in connection with and applied

to the circumstances, it was not erroneous. The secretary had authority to indorse the name of the appellants. An *abuse* of such authority, and a *want* of authority, are different things. (*Bank* v. *Hammond*, 1 *Rich. Law R.* 1.) The company gave him the means of making the respondents believe that he had authority ; and if one of the parties must suffer, they, and not the respondents, should bear the loss. (*Gibson* v. *Pennington*, *Court of Appeals*, *April*, 1852. *McNaughton's Select Cases*, 118 ; 58 *Law Lib. N. S. Ship Fortitude*, 3 *Sum. R.* 252.) From all the circumstances, his authority to bind the appellants is fairly inferable.

III. The appellants have no equitable or meritorious claim for a new trial. The respondents ought in justice to be paid. The defense is merely technical at the best.

By the Court, PEABODY, J. In this case a note made by Shelton was indorsed by the defendant for his (Shelton's) accommodation. The indorsement was made by Sherman, the secretary of the defendant, of his own motion, and without authority other than his general authority, which was to indorse notes and bills "in the prosecution of its (defendant's) business."

The question arises, was this act of the secretary so far authorized as to bind the company as to third persons. No question was made on the argument of the authority of the company to indorse, under the circumstances; of which it would seem there might well be a reasonable doubt, not at all diminished by the recent case of *The Bank of Genesee* v. *The Patchin Bank*, (3 *Kernan*, 314.)

The power itself of the defendant to indorse this paper is not made the subject of a point on the argument, and needs not to be considered here, unless it be in determining the authority of the secretary to bind the company. His authority was supposed to depend on the terms of the resolution declaring the powers of the secretary. It must, however, in the nature of things, be subject to another limitation. It

must be restricted to the business which the company itself was authorized to do. Within the scope of the business which the company was authorized to do, he, as its agent, may be authorized to act for it, but beyond that he could not be authorized; for beyond that the company itself could not act, and of course could not authorize him to act for it.

In the case of *The Bank of Genesee* v. *The Patchin Bank*, (3 *Kernan*, 309,) it was decided that the defendant, by virtue of its general powers of banking, was not authorized to indorse, for the accommodation of another, paper in which it was not interested; because such a transaction was not within the scope of the business for which it was constituted and in which alone it was empowered to act. The business of the defendants was the dressing or manufacturing of stone, in which indorsing of negotiable paper for accommodation would seem at least to be no more necessary or legitimate than in that of banking; and I think that under the reasoning and decision in that case the defendant itself had not power to indorse in this case. Of course its agent could not be authorized, for as it had not the power it could not confer it on him. As a partner, whose power to bind the partnership within the scope of its business is unlimited, cannot bind it beyond the scope of such business, so, in this case, as the business of indorsing negotiable paper for accommodation was not, according to the case above referred to, within the scope of the purposes for which the defendant existed, it was not within its powers to do, and no agent of the defendant was or could be empowered to act for it in that business. If this transaction with the plaintiffs was with Shelton, and for his benefit, and the plaintiffs so understood, or had no reason to understand it to be otherwise, the defendant is not bound by this indorsement.

The notes in suit, however, had their origin in a transaction in 1852. That transaction was a loan by the plaintiff to Shelton of its bills for circulation in New York. Shelton was then president of the defendant, and as president had had at least one transaction of the same character, with the plaintiff

before, and the officers of the plaintiff knew of it, and knew that it was for the benefit of or "*with* the company." No other transactions between Shelton and the plaintiff are shown, and there is no reason to suppose that they had ever had any except the one testified to by Shelton, in which he, as the plaintiff knew, (although he dealt in his own name,) acted for and in behalf of the company. When this transaction occurred, as when the previous one did, he was president of the defendant. With this previous acquaintance and business intercourse, the transaction out of which the present suit grew, commenced on the 22d of April, 1852, by a letter from Shelton to the plaintiffs, stating to them that he was solicited to take some more money for circulation, but had declined, supposing that the plaintiff "might wish to furnish $5000 more on same terms as last, according to our (their) understanding." He proceeds: "Please inform me what your wishes are. (*and as your president stated your charter did not allow you to loan more to one firm,*) you can make the loan to me *individually*, and I *will give you the indorsement of the company.*

P. S. I wrote you yesterday about paying our orders for freight."

The answer to this bears date the next day, (April 23,) and proceeds: "Yours of 22d is before me. I wrote you yesterday in reply to yours of the 21st. We will make you a loan on the same terms as we made the other. *We prefer to make it to you personally, with Co.'s indorsement, to avoid all question about legality. Shall the bills be marked like the others?*"

These two letters embrace the contract out of which these notes sprang; and they show it to have been a contract to repeat a previous transaction. The request is for a loan of "$5000 more on same terms as last *according to our understanding*," and then proceeds to provide a mode of avoiding the limitation of the charter; to do which he says: "You can make the loan (the new one) to *me individually*, and I

will give you the indorsement of the company." The answer, after alluding to a previous letter, which, so far as we are informed, must have related to the business of the company, consents to make the loan on the same terms as the other, and proceeds to suggest a single modification as to form: "We prefer to make it to you personally, with Co.'s indorsement, to avoid all question about legality." The letter of the bank is, to be sure, addressed to Shelton, who was not only president but was in fact the principal stockholder, and pretty much all of the company. They show, it seems to me, an intention to repeat a former transaction, with a variation only to suit the terms of the plaintiffs' charter, by making it to Shelton *in form*, rather than to the company for whom it is evidently understood by the plaintiffs that it was in fact made. It was made on the credit of the defendant, as the previous one was. Other matters with the company are treated of in the same letters, and in the same terms, showing that other business of the plaintiffs with the company was done with Shelton in the same manner as this. The plaintiff, in dealing with the defendant, was bound to see that the dealings were within the scope of the defendant's business; and if it did use reasonable care and diligence to be informed on this subject and was misinformed by the defendant or its agents, the defendant is not discharged, even though the fact should be that the defendant was acting as it should not have done. From the correspondence above, which embodies the contract, in connection with the previous intercourse between the parties, for whom could the plaintiff have thought this loan was made? Is it not apparent that it was understood to be for the benefit of, and in fact made to the defendant, although in form it was made to Shelton on the security of the defendant? If otherwise, what means the arrangement in both the above letters to have it, for the sake of legality, in form with Shelton, rather than the company? If it had been understood to be with and for Shelton, why was there a thought of having

it in any other name than his, which alone has made this special provision on the subject necessary?

The plaintiffs had reason to suppose that this transaction was with and for the defendant, and if it had been, the defendant would have been liable on it. The company had authority to make such a transaction (to borrow money) for itself in the prosecution of its business, and if (as the plaintiff supposed) it had been so made, the indorsement of the secretary would have been clearly within the powers of the defendant and within his authority. On the ground then that the transaction was in fact with the defendants, or if not really so, that the plaintiff was misled by Shelton, the agent of the defendant, to the opinion that it was so, in effect at least the defendant is liable on this indorsement. For this also, the case of *The Genesee Bank* v. *The Patchin Bank*, above referred to for another purpose, is an authority.

The next objection is to the charge of the judge, that the repeal of the act prohibiting the circulation of bank bills of a denomination less than five dollars, repealed also the consequences of the act, as to contracts entered into while it was in force. This principle applies only to those acts of the legislature which are measures of public policy merely, not to those which are intended primarily to establish or affect the rights of parties as to each other. The legislature deeming it wise as a measure of public policy, to restrain the circulation of notes of denominations less than $5, made the act unlawful, and prohibited it, under the consequence, among others, of refusing enforcement of any contract based on such consideration. That law had its day, and was repealed when a change in the wants of society or new light as to its real interests arose. By that repeal the law is decided to be unwise for the present at least, and the contracts made under it, whose consideration was always morally good as between the parties, are now without the legal impediment of being contrary to legally established public policy, (contraband of law,) and are valid. This principle is understood to be fully estab-

lished in the celebrated case of *Curtis* v. *Leavitt, rec'r*, and *Leavitt, rec'r*, v. *Blatchford*, growing out of certain transactions of the North American Trust and Banking Co. (1 *Smith*, 9.) In those cases usury was insisted on as a defense to some claims against the company, and pending the litigation, a law was passed forbidding the interposition of that defense by a corporation. It was passed long after the occurrence of the transactions, and after the defense had been pleaded; but the supreme court in this district held that it deprived the company of the defense, even as to the transactions which were entered into while the law utterly invalidating contracts for usury was in force, and available to corporations as well as natural persons. This decision has been affirmed by the court of appeals, and is now the settled law of this state. The charge in this respect, therefore, was correct.

Another objection to the recovery was that it was not shown that the plaintiff, a foreign corporation, was authorized to enter into a contract with the borrower to keep its notes in circulation, by redeeming them as they were offered for redemption, from time to time. It appeared, however, that the plaintiff was a banking corporation, and such a contract is within the scope of any banking business of which we have any knowledge. A bank is bound to redeem or pay its notes when called on for the purpose. It may surely make a contract with a third person, and (whether he be a borrower or not, is unimportant,) to do it, or furnish funds for the purpose. It would not be easy to imagine a corporation lacking the powers to contract with third persons to furnish it funds with which to pay its debts, or to redeem its obligations; and especially one whose chief end and most legitimate business was the issuing and procuring credit and circulation for its obligations. This was a contract by the plaintiffs to loan its notes, which is surely not illegal, and added to that, a contract by the defendants or Shelton (as the case may be) to re-

deem them, which is almost as surely not contrary to law, and is within the power of a bank.

The judge was asked to charge the jury, (1.) That if the notes were indorsed by the secretary without authority, or for a purpose foreign to that for which the defendant was incorporated, the defendant was not liable; and (2.) That if the indorsements were made for the benefit of Shelton, the defendant was not liable; which he refused. Those requests were not either of them entirely correct, and neither could properly have been complied with literally. Each, however, was proper, with some qualification. To the first should have been added the qualification, "unless the plaintiff was misled by the defendant or its agents, to the opinion that they were made for a purpose within the scope of the business for which the defendant was created, and within which it was authorized to act;" and to the second should have been added the qualification, "if the *plaintiff knew* that they were made for Shelton." The case is relieved, however, of the question suggested here by the subsequent charge at fol. 166, where he did charge as nearly according to the request as was proper, "that if the notes were indorsed for Shelton's private benefit and accommodation, and not for the uses of the company, and the plaintiff had notice that they were so indorsed, then the plaintiffs could not recover." This disposes of all the objections made by the defendant, and leaves the judgment to be affirmed.

Judgment affirmed.

[New York General Term, November 2, 1857. *Mitchell, Roosevelt* and *Peabody*, Justices.]

Byron *vs.* The New York State Printing Telegraph Co.

Where a servant of a telegraph company, in consequence of a defect in a telegraph pole, is injured by a fall therefrom while engaged in the duties of his employment, upon the pole, the company is liable for damages, upon a complaint alleging negligence and unskillfulness in the defendants in providing and using an insufficient and unsound pole, and in not having and using pike-poles and other guards and securities; although *knowledge* in the company, of the defect in the pole, is not expressly alleged.

In such a case the allegation of negligence would be sustained by proving the danger arising from the defect in the pole, and that it was known to the defendants.

APPEAL from an order made at a special term, overruling a demurrer to the complaint. The complaint stated 'That the defendants, at and before the time of committing the grievances hereinafter mentioned, were the owners of a certain telegraph line, extending along the eastern bank of the Hudson river, and partly between the cities of Hudson and Poughkeepsie, in the state of New York; and that the plaintiff was, on the 21st day of April, 1855, in the employ of the defendants, and it was the duty and employment of the plaintiff to climb up on to the telegraph poles, which sustained the wires, insulators and other fixtures of the said telegraph line, and to fix, alter and regulate the same, and it then and there became and was the duty of the defendants to provide, use and keep good, sufficient and safe telegraph poles, and from time to time to renew the same, and also to have and use pike-poles and other guards and securities for testing the strength and safety of said poles. Yet the defendants, not regarding their duty, conducted themselves so carelessly, negligently and unskillfully in this behalf, that by and through the carelessness, negligence, unskillfulness and default of the defendants and their servants, in providing, using and suffering to be used a bad, insufficient, unsound and unsafe telegraph pole, and for want of due care and attention to their duty in that behalf; and for not having and using pike-poles and other guards and securities; and upon the day aforesaid, and

at a place one and a half miles south of the city of Hudson aforesaid, and while the plaintiff in discharge of his employ and duty aforesaid, was fastened at or near the top of one of the aforesaid telegraph poles, and was busied in regulating the wire and insulator thereof, the said telegraph pole to which the plaintiff was fastened, by reason of the unsafeness, defectiveness, and insecurity thereof, and from a defect therein, not visible to the plaintiff, broke off, and fell with the plaintiff so fastened thereto as aforesaid, on to the ground and a ledge of rocks, a distance of twenty-five or thirty feet. By means whereof the plaintiff was greatly hurt, disabled and made sick, and has ever since continued so sick and disabled, and has expended large sums of money for medical services and medicines, and for the support of himself and family, and has been thrown out of all employment by reason of his aforesaid injuries, and will never again be a sound man, or capable of earning a support for himself and family."

Wherefore the plaintiff demanded judgment against the defendants, for the sum of five thousand dollars, besides costs. General demurrer.

The following opinion was delivered by the justice before whom the demurrer was argued at special term; which was adopted by the court at general term, as expressing its views

C. A. Griffin, for the plaintiff.

C. H. Clark, for the defendants.

By the Court, MITCHELL, P. J. In *Keegan* v. *The Western Rail Road Company*, (4 *Seld.* 175,) the complaint is very similar to this, and judgment for the plaintiff was affirmed. Admitted knowledge in the defendants, of the defect in the engine, was not expressly stated there, but proof of such knowledge was received, under a complaint alleging negligence in the defendants. If that complaint had been defective, judgment upon it should not have been affirmed. It is true,

the point was not raised, whether, under such a complaint, proof of knowledge by the defendants, of the defect in the engine, could be given. But the counsel for the company would hardly have omitted such a point, if they had deemed it tenable.

In this case the allegation of negligence would be sustained by proving the danger from the defect in the pole, in this case, and that it was known to the defendants. For this reason, the demurrer should be overruled, with leave to the defendants to amend, on payment of costs of the demurrer.

Order affirmed.

[New York General Term, November 2, 1857. *Mitchell, Roosevelt* and *Peabody*, Justices.]

Manice *vs.* Millen.

In the city of New York taxes are *due* and *payable* on the 15th of January, in each year, at which time a warrant for the collection of those remaining unpaid is issued and placed in the hands of the collector.

A right of entry on the part of a landlord, for a forfeiture, may be suspended without being waived.

The doctrine that the acceptance of rent after a forfeiture has occurred, is a waiver of the forfeiture, is one of intent; it being inferred from the payment and acceptance of rent, that both parties recognize the lease as still valid. But the contrary may be shown by express proof.

In 1852 M. leased certain premises in the city of New York to S., for ten years from the 1st of May, 1852, at a specified rent; with a proviso that if the rent should be in arrear, or if default should be made in any of the covenants in the lease, M. might re-enter. S. covenanted that he and his assigns would pay the rent, and such *taxes* as should be imposed or *grow due* or *payable* out of the premises. In an action by M. against an assignee of the lessee, to recover the possession because of the non-payment of the taxes for the years 1853 and 1854, it appeared that on the 15th of December, 1854, the plaintiff told the defendant that unless the taxes were paid he would eject him. The defendant promised to pay by the 1st of January, and the plaintiff gave him until that day to pay. On the 8th of February, 1855, the defendant paid, and the plaintiff accepted, the rent due on the 1st of that

month; leaving the taxes unpaid. *Held* that it was to be inferred from the circumstances, that both parties understood the right of forfeiture should not be *waived* but only *suspended* until notice to the contrary should be given; and that an action to enforce the forfeiture would not lie without proof of such notice having been given.

APPEAL by the defendant from a judgment entered at a special term, denying a motion for a new trial. The action was brought to recover the possession of demised premises, and the plaintiff recovered a verdict.

Charles Tracy, for the appellant.

C. P. Kirkland, for the respondent.

By the Court, MITCHELL, P. J. In 1852 the plaintiff, Manice, leased to one Stone two lots of land in the city of New York, for ten years from 1st of May, 1852, at a certain rent, payable quarterly; with the proviso that if the rent should be in arrear, or if default should be made in any of the covenants therein contained on the part of the lessee or his assigns to be performed, the lessor might re-enter. The lessee covenanted that he and his assigns would pay the rent, and would also pay and discharge all such taxes, (including the Croton water tax,) as during the said term thereby demised should be imposed, or grow due or payable out of the said premises. The lease was assigned to the defendant. This action was brought to recover possession of the lands, for non-payment of taxes. The complaint states that there are now due and payable and unpaid, all the taxes which were imposed on said premises for the years 1853 and 1854, and the estimated taxes for 1854, amounting to more than $125. The answer denies the forfeiture, (which is a conclusion of law,) but does not deny that the taxes were imposed and were due and unpaid; yet it alleges that no sufficient demand to pay the taxes had been made, on the defendant; and that after the *levying* of the taxes "the plaintiff, with full knowledge that all said taxes were due, payable and unpaid waived any supposed for-

feiture" by reason of said non-payment or any other cause. The evidence showed that the plaintiff, on the 15th of December, 1854, told the defendant that unless the taxes should be paid he would eject the defendant. The defendant replied that he would pay by the 1st of January, when he expected money from a mortgagor. The plaintiff told the defendant he might have until that day to pay. The defendant offered to prove that on the 8th of February, 1855, he paid the rent due on the 1st of that month, and that he had erected buildings required by the lease, and that they were of large value. The lease required the lessee to erect buildings to cost $400, and gave him leave to remove them three months before the expiration of the term.

In erecting the buildings the defendant did no more than he had covenanted to do. There was no offer to prove that these improvements were made after a cause of forfeiture had occurred, and that the plaintiff saw them in progress. These two acts would be a waiver of the forfeiture. It was strenuously argued that no time was precisely fixed, in the lease, for the payment of taxes, while the time of payment of rent was so fixed, and that in the city of New York there is no obligation to pay taxes, even for two years after they are imposed. The taxes, here, are confirmed in September for the current year, and interest is deducted to 1st December following, for all amounts paid before 1st of November of that year. On the 1st of December, one per cent is added to the tax; on the 1st of January, two per cent; and if the tax is not paid by the 15th of January, a warrant issues to the collector, to collect the same. When the lands are sold for non-payment of taxes, they may be redeemed at any time within two years. The answer admits that the taxes were due and unpaid, by not denying it, and by alleging a waiver after "the taxes were due, payable and unpaid." A defendant admitting one fact in an answer, although he accompanies it with another allegation which favors himself, is bound by his admission, and obliged to prove his new allegation. But there can be no

doubt that these taxes were due and payable on the 15th of January, when the warrant for their collection was placed in the collector's hands. Interest is allowed by way of discount for prepayment before November 1st, and charged for any delay beyond that month; not (as was argued) from a consent that in this city tax-payers may take their own times to pay if they pay interest in addition, but to induce an earlier and to compel a a prompt payment. The taxes are a charge on the lands from the time when they are confirmed; a wrong is done to the landlord if they are left unpaid so long that interest is added to the principal; and a still greater wrong if payment is delayed so long that the debt is put into the hands of an officer to collect, with interest and costs.

The question then arises, did the acceptance of rent on the 1st of February, 1855, amount to a waiver of forfeiture for non-payment of all taxes that should have been paid before that time.

The acceptance of rent is generally a waiver of a previous cause of forfeiture, if that cause were known to the landlord. But this rule does not apply to cases of "a continuing breach." (*Arch. Land. and Ten. pp.* 98, 101.) So where there was a covenant that rooms should not be used for certain purposes, and they were so used, and afterwards the landlord accepted rent, and the tenant continued, after that, to use them for the same forbidden purposes, ejectment could not be brought for the misuser prior to the payment of rent, but was sustained for the subsequent continuance of the same misuser. (*Doe ex dem. Ambler* v. *Woodbridge*, 9 *Barn. & Cress.* 376.) And where the lessee covenanted to insure, and *keep* insured, the buildings, and he neglected to insure and the landlord distrained for rent, and afterwards brought ejectment, it was held that he might recover; that the lease meant that the lessee should always keep the premises insured by some policy or another, and that it was broken if they were uninsured at any one time; that "there was a continuing breach of the covenant for any portion of time that the buildings remained

uninsured." (*Doe ex dem. Flower* v. *Peck*, 1 *Barn. & Ad.* 428.) Thus far, this last case seems in favor of the plaintiff. But the court add, *obiter*, that if the covenant had meant that the original lessee should insure, and that he and his assigns should keep that same policy always in force, the *assignee* of the lease would not have been guilty of any breach, if the lessee had never insured, as the policy which the assignee was to continue, never could have existed, and then the distress would have been a waiver of the breach by the lessee. It is uncertain whether in this *obiter* part of the opinion the court meant to say that if there was to be but one policy always kept on foot, acceptance of rent would have been a waiver of forfeiture, even if the lessee had been in possession; or that, as the covenant in that event could be satisfied only by the lessee himself effecting it, and not by his assignee doing it, the waiver of the forfeiture for the lessee's default which the assignee could not repair, exonerated the assignee from the effect of that forfeiture. The latter is equitable, and was probably intended.

Those cases may be said to decide only that there may be a forfeiture, notwithstanding the acceptance of rent, where a cause of forfeiture existed before the rent was paid, and the same cause was continued afterwards in such a manner that the continuance, of itself, made a new cause of action, to which alone the landlord need refer without proving the prior cause, and that here the landlord had but one cause—the non-payment of taxes which were due before the payment of the rent, and did not become due again. This may be so, but the acts of the parties operated to postpone this cause of action by their mutual consent. The plaintiff gave notice that he would eject unless the taxes should be paid; and then the defendant agreed that they should be paid by the 1st of January next. The forfeiture was not then enforced, but there was a further indulgence, not by agreement but by acquiescence. And, it may be inferred that both parties understood that this right should be suspended, not waived; and if suspended, that it

would be so until notice to the contrary should be given. In the faith of this, the defendant probably paid his rent and the plaintiff accepted it. The plaintiff never could have intended to abandon a right which he had so recently insisted on; nor could the defendant suppose it would be enforced without further notice. No such notice was proved. That the right of entry may be suspended without being waived, even if rent be accepted, see *Doe* v. *Brindley*, 4 *Barn. & Adol.* 84, and *Arch. Landlord and Tenant*, 101. The doctrine that the acceptance of rent is a waiver of a forfeiture, is one of intent; it being inferred from the payment and acceptance of rent that both parties recognized the lease as still valid; but the contrary may be shown by express proof.

There should be a new trial; costs to abide the event.

[New York General Term, November 2, 1857. *Mitchell, Clerke* and *Peabody*, Justices.]

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Hamilton *vs.* The Accessory Transit Company, Cornelius Vanderbilt and others.

An injunction and receiver will not be granted against a corporation, at the suit of a stockholder, on the ground that the company has been dissolved, and its charter annulled by a foreign government, where the decree of dissolution is not absolute, but declares that the company shall be considered in existence for certain specified purposes; and where the company has property in this state, over which the foreign government had no jurisdiction, and it appears that it will be more conducive to the interests of all the stockholders, not to disturb the existing management and arrangements of the company, and that to grant the relief asked for, would produce irreparable injury to a majority of the stockholders.

If the decree of the foreign government, dissolving the corporation and annulling its charter, is recognized here as binding on the company and its stockholders, and by its terms the property of the company is to be seized and held subject to the order of commissioners therein appointed, to whom all right and title to the property is intended to be passed, a stockholder could not, in the courts of such foreign country, apply for a receiver, and therefore he cannot apply for a receiver here.

Hamilton *v.* Accessory Transit Company.

THE plaintiff sued in behalf of himself and other stockholders of the Accessory Transit Company who should come in and contribute to the expenses of this suit, on a complaint, stating that ever since the 18th February, 1856, he has been, and now is, owner of 200 shares of the stock of said company; that previous to said 18th day of February, 1856, the Accessory Transit Company was a corporation created by the government of the state of Nicaragua; that on that day it was dissolved by a decree of that government, duly made and published; that the defendant Vanderbilt, and some other defendants, are, or pretend to be, officers of said company, and that some of them have property of the company to a large amount in their hands; that the directors and officers were all of them residents of the city of New York; and having annexed to his complaint a copy of the charter, and of the decree dissolving said company, he asked that the company be declared to be insolvent; that a receiver of the property be appointed; that the defendants be enjoined from parting with the property of the company; that Vanderbilt and other defendants be ordered to account for all the moneys received by them, from or for the company, and particularly, that Vanderbilt account for all moneys received from the Pacific Steamship Company and others; that the debts of the company might be paid, and the property distributed among the stockholders.

The defendants put in an answer denying, among other things, that the decree referred to in the complaint, was made or published by the government of Nicaragua; and on this denial the principal issue in the cause was formed. They also insisted that this court has not jurisdiction in the premises to wind up the affairs of the company, it being a foreign corporation.

The case was tried at a special term, before a judge without a jury, and the court found, as facts—That the decree was the act of the government *de facto* of Nicaragua; that the plaintiff was owner of the stock he claimed to own; that

a large amount of the property of the company was in the hands of the defendant Vanderbilt, who was president of said company; that the capital stock of said company consists of 78,700 shares, and that none of the owners had signified any objection to his management of its affairs except the plaintiff. The court further found, that it would be more conducive to the mutual interests of all the stockholders, not to disturb the present management and arragements of said company, but to leave the same to be determined by a majority of the stockholders, when they deem it proper to act in relation thereto; that it would be detrimental to the interests of the company to appoint a receiver, and that to grant the relief prayed for in the complaint would produce irreparable injury to the mass of the stockholders; and ordered judgment, that the complaint be dismissed with costs.

From this judgment the plaintiff appealed.

D. D. Field, for the plaintiff.

Horace F. Clark, for the defendants.

MITCHELL, P. J. The Rivas-Walker administration assuming the legislative and executive authority of Nicaragua, on the 18th of February, 1856, declared the charter of the Accessory Transit Company annulled, and the company dissolved and abolished, *except* for purposes thereafter mentioned. They then appointed persons called commissioners, to ascertain the amount due from the company to the state, and to hear the agents of the company, in Nicaragua, "with the privilege to defend the interests of their principals." It was expressly declared that the company was to be considered *in existence* for the purpose of conducting that examination, and for the purpose of being *collectively* responsible for such sums as might be ascertained to be due to the state, but for no other. The commissioners were to cause all the property of the company to be seized and to be held subject to the order of the board.

This was an act of despotic power, passed without notice to and without hearing the company, and contrary to the charter granted to it, which provided for the settlement of disputes between the company and the state, by commissioners to be mutually chosen. The government had no jurisdiction over the property of the company beyond the state of Nicaragua, and its decree (made without hearing the company) was a nullity as to such property. It may be presumed that as dictatorial power was assumed by that administration, it could have made a decree absolutely revoking the charter, and that this would have been deemed by other states valid, as to property in Nicaragua. But the decree does not absolutely annul the existence of the company, but on the contrary, keeps the company in existence, for certain purposes, amongst others, for the purpose of having the examination made as to the amount due from the company to the state, and for the purpose of being collectively responsible for the amount thus to be found due. If, therefore, we were bound to recognize that decree as to the rights of the company to be enforced here, or as to its property here, and to adopt the whole of the decree, we must consider the company as still in existence. If in existence for any purpose, any other state than Nicaragua will consider it as existing for all purposes consistent with the interests of such other state and of its citizens. Under the decree, if recognized fully here, the company would be deemed in existence here, "for the purpose of being collectively responsible" for the amount due to the state of Nicaragua. The state could, consistently with that decree, sue the company here, and recover any amount due to the state from the company. The company could plead to such suit; could in a proper case enjoin proceedings in it; and could, in its own name, appeal from a judgment that might be obtained against it. In case of such a judgment in our courts, it might be compelled in its corporate name to assign its property to a receiver, to satisfy the judgment recovered against it. To enable it now to satisfy

such claim, it must be allowed to collect the debts due to it; to sell its property, and give deeds for it; and to do this in its own name. In this way, most readily can it be made "collectively responsible" for the amount that may be due to the state of Nicaragua.

The decree thus made can have no effect, except as to the property that might be actually grasped by the power that issued it. Its main object was (on its face) to seize the property of the company. Certainly our courts would not aid in the enforcement of that part of it, except that if the property actually within that state were seized there, and the title there lawfully transferred, the transfer of such property would be sustained here.

There are circumstances peculiar to this case that forbid the interference of our courts, in any measure, which would recognize that decree as valid in the United States. The charter was granted for the purpose of establishing canal and rail road communication by the isthmus of Panama from the Atlantic to the Pacific ocean. This was a matter of national interest to our country. Our government accordingly entered into a treaty with Great Britain, agreeing that the persons to be employed in making the canal, and their property to be used for that object, should be protected, from the commencement of the canal to its completion, by the governments of the United State and Great Britain, from unjust detention, *confiscation*, *seizure*, or *any violence* whatever. Mr. Vanderbilt, the president of this company, appealed to our government, claiming protection and redress against the decree of the government of Nicaragua. If, as is generally understood, (although the papers below do not directly show it,) our government has recognized this claim, our courts also must recognize it; on the same principle upon which they look to our government alone to ascertain our relations with foreign nations, or the character in which we are to regard them. If our government insists that this decree is a violation of the rights of our citizens, can our courts, even while the matter is in discussion,

assume a contrary position, or by any act carry out such decree?

If the decree were to be recognized here as entirely binding on the company and its stockholders, it would defeat the plaintiff's claim. For by the decree, the property of the company is to be seized and to be held, subject to the order of the board of commissioners appointed under the decree. By that decree, all right to the property is intended to be passed to the commissioners, and they, and not the stockholders, are to have title to it. The plaintiff, as a stockholder, could not, in the courts of Nicaragua, make the claim which he presents here, and cannot therefore succeed here.

Nor is the proposition that a partner in a concern which is abruptly terminated by an act of usurpation, but which may be shortly established, is entitled to a decree winding up the affairs of the concern, clear law. The rule is one of equity, and not of arbitrary law, and is therefore to be molded and applied only as equity may require.

The judgment of the special term should be affirmed with costs.

CLERKE, J. concurred.

PEABODY, J. (After stating the facts.) The court at special term has decided and adjudged, that the decree of the 18th of February, 1856, made by Patricio Rivas, then provisional president of the state of Nicaragua, by which the Accessory Transit Company was declared to be dissolved, was the act of the *de facto* government of Nicaragua. The company had existed until that time, under and by virtue of a charter granted by the government of that state. It was the creation of that state, and in the absence of any thing in the nature of a compact to the contrary, the state retained the power to revoke at pleasure the franchise it had granted. In the exercise of that power it made the decree referred to, and thereby dissolved it. It was strenuously insisted at the trial that the decree was not the act of the legally instituted gov-

ernment of the state. That question has been decided, however, at special term, and from the decision no appeal has been taken, and indeed the finding seems to be sustained by the evidence. The decree, being the act of the government, is effectual to produce the dissolution. That company then is dissolved, having a large amount of property in this state. That property, by the dissolution of the company, became, for all the purposes of use, preservation and disposition, destitute of an owner, and it is now without any person or organized body having a right to dispose of, direct, control, or even interfere with it. I am now assuming that the property, after the payment of the debts of the company, belongs to the stockholders. Whether it does in fact so belong, I will consider hereafter. But assuming for the present that it does, the case, which it is insisted this court will not entertain, stands thus: The plaintiff having an interest of $\frac{2}{787}$ in certain steamers and other property in this state, now in possession of persons who are joint owners with him, asks to have the property applied to the payment of the debts for which it is liable, and the balance, if any, divided, and his share ascertained and paid over to him. The company, to the uses of which it was dedicated, has ceased to exist, and of course has ceased to have any right to it. The plaintiff's title to the share he claims, is placed beyond all question by the findings of the judge at special term. Under these circumstances, will this court interfere on his application? The property, said to amount to millions, is for practical purposes derelict. No person has a right to administer it, except by authority of the court. The parties now in possession of it have some claims to it, or rather claims against it, as security for moneys said to be due them. No one at present is authorized to settle their claims. They are claims *in rem.* Unless there is some objection to the jurisdiction, arising from the manner in which the parties have come to their rights, the case is peculiarly one for the interposition of this court as a court of equity. Ordinarily a property in this condition could prop-

erly be the subject of administration in this court, and I see nothing in the manner in which this has fallen to the present owners, to make it an exception. Under such circumstances, it would ordinarily be the right of any person having an interest in the property, to have it administered as the plaintiff herein asks to have it, and the mode of doing it would be the very mode urged here—the appointment of a receiver with powers to take charge of the property, convert it into money, pay the debts of the company, and bring the balance into court, or at least report it to the court, and then to call on the court to distribute the residue among the parties entitled to it.

This, however, is on the assumption that the plaintiff, as a stockholder, is entitled to a distributive share of the property of the corporation, now that its existence is terminated by dissolution. He is a shareholder, and his rights in virtue of that fact—in the absence of all express provision for them in the charter or elsewhere—depend on the law applicable generally to stockholders of a dissolved corporation. He must have rights and interests in it to enable him to prosecute this suit; and in the inquiry as to his rights we encounter a difficulty which lies at the foundation of the plaintiff's case, and which singularly enough is not suggested by the answer, and nothing in the case shows that it was urged on the trial below. It seems to me to be fatal to the plaintiff, however, even at this late stage of the case. This corporation was created, had its career, and finally terminated its existence in a foreign country, to wit, Nicaragua. When it was dissolved, the consequences of that act to stockholders and creditors, and all interested in it, depended on the law of that state. Of course the rights of the plaintiff herein depend entirely on that law; and he has omitted in his complaint to plead it. Whether as a former stockholder he has a right to a distributive share of the property, without which he has no standing in court, depends on the law of the country in which the company existed and was dissolved. (*Ang. & Ames on*

Corp. 195, 196 *and* 779.) If we are to decide on his rights, we must do so on the strength of the law by which they are governed, and of that law we have no judicial knowledge. The laws of New York, of which law we have judicial knowledge, do not apply, and we cannot see whether the plaintiff has any interest in the effects of the late company or not. In the absence of all information from the pleadings or evidence, we are bound to intend that the common law prevails there, and of that law we may take judicial cognizance. At common law, on the dissolution of a corporation, the real estate reverted to the grantor or his heirs, and the personal property vested (in England) in the king as the sovereign, and in our country vests in the people as succeeding to his right and prerogative. If we are to act upon these facts as they now stand pleaded and proved, we must give effect to them under the light of the common law, and by that law the plaintiff has no right in the subject matter of this suit, and of course has no standing in court. His complaint, therefore, fails to state facts sufficient to constitute a cause of action. It fails to state facts which entitle him to any share or interest in the assets or property concerning which he asks the interposition of this court. He has no rights, according to his own showing, and the judgment below dismissing his complaint should be affirmed with costs, unless he, within twenty days, elects to amend his complaint in this respect, in which case he should have leave to do so on the usual terms.

Judgment affirmed.

[New York General Term, November 2, 1857. *Mitchell, Clerke* and *Peabody*, Justices.]

26 55
128a 553
26 55
39 71
26 55
64h 386

In the matter of the petition of JOHN BERRY, Receiver of the Atlas Insurance Company.

Where, after an execution has been issued and a levy made thereon, the defendant appeals from the judgment and gives security upon the appeal, the appeal will not have a retrospective effect, so as to discharge the lien created by the levy.

Whatever rights or liens are acquired by a levy are treated as if they were vested rights, not to be superseded by personal security, but as suspended only until the decision of the appellate court. After the appeal is dismissed, the respondents are entitled to resume proceedings on their execution, and have priority over a subsequent execution.

The appointment of a receiver of an insolvent corporation takes effect from the time of granting an order for a reference to appoint a receiver; and from that moment no act can be done affecting the property of the corporation, either by the corporation or its creditors.

The object of the statute authorizing proceedings against insolvent corporations is to take away the franchises of the corporation, and its powers of action, immediately on a petition for a receiver being filed, if the prayer of the petition be finally granted.

And although the receiver cannot take possession of the property of the corporation, or be deemed vested with the estate, before he is appointed, yet when his appointment is completed, the estate vested in him relates back to the time of granting the order for a reference to appoint a receiver.

APPEAL from an order made at a special term, denying the prayer of the petition. On the 23d of November, 1854, B. Bidwell and J. W. Banta recovered a judgment, in the superior court of Buffalo, against the Atlas Mutual Insurance Company. On the 3d of January, 1855, the plaintiffs, by virtue of an execution issued upon that judgment, levied on certain desks, and an iron safe belonging to the company. The company appealed from the judgment to the general term. Smith and Chesbrough became their sureties upon the appeal, and to protect them the company assigned to them securities to the amount of $9000. The judgment was affirmed by the general term, and an appeal to the court of appeals was taken. During its pendency, on the 5th of March, 1856, proceedings were taken for the appointment of a receiver, and an order was made, to show cause why a receiver should not be appointed and an injunction granted, and in

the mean time an injunction was issued. On the 11th of March, shortly after ten o'clock A. M., an order was made, that a receiver be appointed, to take charge of the property of the company; and it was referred to a referee "to appoint a receiver and take from him the requisite security." And it was declared that on filing his report and the security, such receiver should be empowered to take charge of the property, &c. of the company, and that he be invested with all the estate of the company from the time of the filing of such security, and should be the trustee of its estate. The order also perpetually enjoined the company from paying any debts or exercising any corporate rights, &c. On the 25th of March, 1856, the referee appointed John Berry such receiver. On the 11th of March 1856, after 3 o'clock P. M., D. R. De Wolf obtained judgment in the superior court of New York, against the company, and on the same day the sheriff levied on the same property which had been levied upon under the execution in favor of Bidwell and Banta. The receiver determined to compromise the suit brought by Bidwell and Banta, and with the consent of the court he settled with them, they receiving from Smith and Chesbrough the sureties, less than $3200, and assigning the judgment to them. The receiver agreed with the sureties to reimburse them from time to time from moneys to be received by him, and they reassigned the securities to him. The receiver then presented a petition asking leave to pay the sureties out of the proceeds of the property levied on under the execution in favor of De Wolf; the superior court having authorized him to sell in place of the sheriff, and to hold the proceeds subject to the order of this court. The court, at special term, made an order denying the prayer of the petition, and the petitioner appealed

C. C. Egan, for the appellant.

Young & Ruthven, for De Wolf.

By the Court, MITCHELL, P. J. The receiver presents his claim on two grounds: first, that the first levy was under the

oldest judgment, and that the appeal and security given thereon did not discharge the levy; second, that the appointment of the receiver took effect from the time of granting the order for a reference to appoint him, and that from that moment no act could be done affecting the property of the company, either by the company or its creditors. The counsel for De Wolf, conceding that such may be the effect of an assignment to a receiver, under proceedings in ordinary actions supplementary to executions, insists that the statute controls in this case, and that it dates the power of the receiver from the time of his appointment and security being filed, which was fourteen days after the levy by De Wolf.

Under the revised statutes a writ of error with sureties and an order of stay, if an execution had been issued, but not fully executed, stayed the further execution thereof. (2 *R. S.* 597, § 30.) If the execution had been levied but no sale had taken place, it stayed the sale. (*Delafield* v. *Sandford*, 3 *Hill*, 473.) If an appeal were taken and a bond given but not in due form, and leave were given to amend the bond, and then execution issued and was levied, the court, on the amendment being completed, would supersede the execution, thus putting the appellant where he was when the amendment was allowed. (*Clark* v. *Clark*, 7 *Paige*, 607.) If an appeal were taken from a justice of the peace to the common pleas, it released goods levied on, from the lien. But this was by virtue of the express words of a particular statute. (2 *R. S.* 259, § 192, *&c. Wilson* v. *Williams*, 18 *Wend.* 581.) The code has not the minute provisions of the revised statutes as to the effect of a writ of error or appeal, and security given thereon. It provides, in general terms, that "if the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment unless" an undertaking be given, "to pay the money." Before the revised statutes, a writ of error did not stay an execution, after levy. (*Delafield* v. *Sandford*, *supra*.) It might be a question whether the language of the code does not restore that law; but a literal construc-

tion of it, and the general principle that it ought not to be construed as changing the old law, when it has substituted language that may embrace the old, would sustain the amendment made by the revised statutes. Still this general principle pervades all the provisions of the revised statutes (and of the code by consequence) that the appeal and security have no retrospective effect. They do not undo any thing already done, or take away any lien once created. They only stay an execution if it has not issued, or its *further execution* if it has issued; so that if issued and a levy was made, the sale under the levy was stayed, but the levy was not interfered with. Whatever rights or liens were acquired were treated as if they were vested rights not to be superseded by personal security, but suspended only until the decision of the appellate court. This lien continued, even as to real estate, and made it necessary that the legislature should interfere, and by a special amendment of the code (§ 182) enable the *court*, on notice to the respondent, to direct an entry to be made on the docket of the judgment, "secured on appeal." This cannot be done except by leave of the court, and on motion, and is not the necessary effect of the appeal. When the order and entry are made, the lien of the judgment is not discharged as to all persons, and not at all as to subsequent judgment creditors. The judgment then only "during the pendency of the appeal ceases to be a lien on the real property of the judgment debtor as against purchasers and mortgagees in good faith." In other words, purchasers and mortgagees in good faith may then, during the appeal, deal with the real estate as if there were no lien on it; but they cannot after the appeal is disposed of, and as to subsequent judgment creditors the lien remains undisturbed. This shows that in this case the respondents, after the appeal was dismissed, were entitled to resume proceedings on their execution, and have priority over a subsequent execution. Mere delay would not take away this lien. (*See matter of Clark*, 3 *Denio*, 167.)

As to the second question. Art. 2, title 4, ch. 8, pt. 3 of

2 R. S. (*p.* 462) relates to proceedings *against* corporations. Art. 3 of the same title relates to proceedings by them for their *voluntary* dissolution. Section thirty-six authorizes the court of chancery, on a judgment and execution returned unsatisfied, against a corporation, "to sequestrate the stock, property, things in action and effects of such corporation, and to appoint a receiver of the same." Sections thirty-nine, &c. authorize the court, when a banking or insurance company "becomes insolvent or unable to pay its debts," by injunction to restrain it from exercising any of its corporate rights and from collecting or receiving any debts or demands, and from paying out, or in any way transferring or delivering to any person, any of the moneys, property or effects of such corporation until the court shall otherwise order, and to appoint one or more receivers of the property and effects of the corporation; and declare that the *receiver* "shall possess all the *powers* and *authority* conferred, and be subject to all the obligations and duties imposed in article three of that title upon receivers appointed in case of the voluntary dissolution of a corporation." Sections 67 and 68 (*p.* 460) declare that the last mentioned receivers shall be vested with all the estate, real and personal, of such corporation, from the time of their having filed the security "therein required, and have all the power and authority conferred upon trustees to whom an assignment of the estate of an insolvent debtor may be made pursuant to ch. 5 of part 2 of the revised statutes." Section 71 declares all sales, assignments, transfers, mortgages and conveyances of any part of the property of the company "made after the *filing of the petition* for the dissolution thereof," and all judgments confessed by such corporation after that time, absolutely void as against the receiver and the creditors of the corporation. Section 79 directs the payment by the receiver, 1. Of debts entitled to a preference under the laws of the United States; 2. Of judgments against the corporation, to the extent of the value of the real estate on which they shall be liens; and next, of all other claims, *pro rata*.

The act respecting absconding and non-resident debtors avoids all sales, and judgments confessed, after the first publication of the notice of the attachment, and makes a voluntary payment by a debtor, to the insolvent, at least presumptively fraudulent as against the trustees.

The object of the act is to take away the franchises of the corporation, and its powers of action, immediately on the petition being filed, if the prayer of the petition be finally granted. The court adjudges that at that time it was insolvent and then unable to pay its debts, and then liable to have all its property pass out of its control into the custody of the court and of a receiver to be appointed by it. Such is declared to have been its condition at that time, and not merely when the final order was made. Accordingly, any voluntary disposition of its property, made after that time, is absolutely void; and any judgment confessed by it is also absolutely void. Such judgment is not even evidence of a debt. Subsequent involuntary judgments may be evidence of a debt, and in that respect alone have advantage over a judgment confessed. If they could give a lien on the property they would be a ready means of indirectly preferring favorite creditors; and would thus defeat the object of the law, which forbids such direct preference, and which, by taking away from the company its franchises from the time of the filing of the petition, from that time extinguishes its life and makes it incapable of having a judgment entered against it. The 67th section is not inconsistent with this. It does not profess to pass on the title which creditors of the company may acquire against the company, but is intended to prescribe the period at which the estate of the company shall be *vested in the receiver*, so that thereafter the debtors of the company may be bound to settle with him alone, and so that after that time, also, he shall be enabled to take the possession. Before that time, the receiver cannot take the possession, or be deemed vested with the estate; as an executor since the revised statutes, and an administrator at all times, is not deemed vested with the estate

of the decedent until letters are granted by the surrogate ; but when so vested, the estate in him relates to the time of the death of the testator or intestate, and all judgments, after such death, are inoperative as against him. Such also is the effect of the order of the 11th of March, taking away from the corporation its corporate rights and franchises, and thus destroying that artificial life which the law had given to it.

The order appealed from should be reversed, without costs, and the receiver be authorized to apply the proceeds of the property levied on under the execution in favor of Bidwell and Banta towards satisfying so much of their judgment as they finally agreed to reduce it to.

[New York General Term, November 2, 1857. *Mitchell, Roosevelt* and *Peabody*, Justices.]

Carroll *vs.* Finley.

26 61
48 147

Where an attachment is issued against the property of an individual as a non-resident debtor, which is served on other persons, on the ground of their having in their possession property of the defendant, and they furnish to the sheriff statements or certificates under their respective hands, denying that they have in their hands any property belonging to the defendant, the plaintiff has no right to call upon such persons to be examined, under sec. 236 of the code, until he impeaches the verity of the certificate.

Such rights are given only in case of a *refusal* to give the certificate.

But if the plaintiff establishes, to the satisfaction of the judge, by the former admissions of the party, that the persons sought to be examined have property of the defendant and that the certificate stating that they have none is untrue, such conduct may be regarded as a refusal to give the required certificate, and the individuals may be examined.

APPEAL from an order made at a special term, by Justice Peabody.

Cutting and *Williams*, for the plaintiff.

L. Sherwood, for Wattles and Angel.

DAVIES, J. On the 20th of August, orders were obtained on behalf of the plaintiff for the examination of Wattles and Angel, on the allegation that they held property in their possession belonging to the defendant. It appeared before the judge below, that an attachment had been issued in this action, to the sheriff of the city and county of New York, against the property of the defendant, as a non-resident debtor, and which was served by the sheriff, on the 5th of August last, on said Wattles and Angel. At the time of such service they furnished to the sheriff statements or certificates under their respective hands, denying that they had in their hands any property belonging to the defendant. Justice PEABODY vacated the orders for the examination of said Wattles and Angel, on the ground that section 236 of the code only authorized the examination of a party who refuses to give the certificate therein required.

We think the court below right in the view taken of this section. The attachment, by § 235, is to be served on the president, or other head of any corporation or association, or the secretary, cashier or managing agent, in the stock of which said defendant has any right or share, with the interests and profits thereon, or on any debtor of such defendant, or any individual holding his property. By section 236, it is provided that on the application of the sheriff to such officer, debtor or individual, he shall give a certificate specifying the exact nature and extent of the property so held. If such officer, debtor or individual refuse to give such certificate, he may be examined concerning the same. In the present case, the persons sought to be examined did not refuse to give the certificate. On the contrary they did give a certificate, setting forth that they had not in their hands any property of the defendant. It is true that the certificate does not set forth the property of the defendant, and for the good reason that if true, it could not set forth the same.

Upon such a certificate, the plaintiff has no right to call on the party holding property of the defendant to be exam-

ined, until he impeaches the verity of the certificate. If he establish, to the satisfaction of the judge, by the former admissions of the party, that the party sought to be examined has property of the defendant, and that the certificate stating that he had not is untrue, then, we think, such conduct might be regarded as a refusal to give the certificate required by this section, and the party might be examined. In the present case no such facts were shown to the court, and we therefore think that the order made, discharging the order for the examination of these parties was proper, and should be affirmed with costs.

CLERKE, J. concurred.

MITCHELL, P. J. Two things are to concur, to subject the third party to an examination; he must be a debtor of the defendant or have property of his in his control, and he must refuse to give a certificate. Of the first there is no proof when the third party certifies that he has nothing of the defendant, and this is met only by information and belief that he has such property.

Order affirmed.

[NEW YORK GENERAL TERM, November 2, 1857. *Mitchell, Clerke* and *Davies*, Justices.]

GRANT and others *vs.* HOTCHKISS.

Upon a guaranty that "all drafts drawn by G. C. H. will be duly honored and paid by me, should he meet with any misfortune that he will not be able to do it himself," the guarantor undertakes to pay the amount of the drafts if G. C. H. shall not be able to do it himself. It is not therefore necessary for the acceptors to prove that they have exhausted their remedy against G. C. H. It is only necessary to show that the drafts were not paid when they became due.

26 63
35 469

Grant v. Hotchkiss.

APPEAL from an order made at a special term, overruling a demurrer to the complaint. The complaint alleged that the plaintiffs were partners in trade, carrying on business as commission merchants at the city of New York, under the style and firm of Grant, Sayles & Co. That the said defendant in the month of August, 1855, introduced to the plaintiffs one George C. Hotchkiss, and solicited them to permit the said George C. Hotchkiss (then a merchant, carrying on business at Youngstown, N. Y., and who was about purchasing wheat to forward the same to New York, for sale,) to make drafts on them, the said plaintiffs, for the purchase of said wheat. That the said defendant, for the purpose of securing these plaintiffs in the said business, on the 5th day of November in the said year, (1855,) addressed to said plaintiffs a letter by him subscribed, containing among other things the following paragraph: "In reply, I would state that all drafts drawn by George C. Hotchkiss will be duly honored and paid by me, should he meet with any misfortune that he will not be able to do it himself." The complaint further alleged that the said George C. Hotchkiss in said letter referred to, in the course of the aforesaid business and subsequent to the date of the said letter, made drafts on the plaintiffs for the sum of $6500 in the aggregate, which the plaintiffs, on the faith of the undertaking of the defendant as contained in the said letter, and at his request, accepted and paid. And the plaintiffs averred that the said George C. Hotchkiss had failed and neglected to pay or cause the same to be paid in full, or to provide means for the payment thereof by the shipment of wheat or otherwise, and that there was a balance due and payable to them thereon of $1229.91, for which sum, with interest and costs, the plaintiffs demanded judgment.

To this complaint the defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action; also that it did not appear in the letter of the defendant, set forth in the complaint, that there was any consideration, as required by statute, expressed therein; that it

appeared from said letter that the defendant agreed to pay only in case Hotchkiss should meet with any misfortune that he would not be able to do it himself, and that it nowhere appeared in the complaint that Hotchkiss had met with any loss or misfortune by which he was unable to pay the drafts; and that it nowhere appeared that the plaintiffs had in any way endeavored to collect their claim of Hotchkiss, or had in any way settled or adjusted the same with him; neither did it appear in the complaint that all or any drafts drawn at the date of the said letter were unpaid, or any part thereof.

The following opinion was delivered at the special term, by the judge before whom the demurrer was argued:

CLERKE, J. "Every obligation of a surety is a liability accessory or collateral to that of another person. Under no form of expression can it be any thing else. If the contract imports more than this, he becomes a principal debtor. But the contract of a surety may be for the payment of the debt when it becomes due, or it may only amount to an assurance that the principal debtor is solvent and that the demand can be enforced against him. In the one case the surety is liable at once, on the failure of the principal to satisfy the demand; on the other, he is liable only when the necessary legal means of enforcing compliance against the principal have been exhausted, or at least in proving by legal evidence that he was not solvent. To determine to which class any guaranty belongs depends of course upon the construction of the language employed.

The guaranty mentioned in *Curtis* v. *Smallman*, (14 *Wend.* 231,) was in these terms, 'I warrant the note good,' and it was decided in that case to be a guaranty that the note was collectible, and not that it would be paid on demand. This was deemed to be the ordinary popular signification of the phrase. The language of the guaranty before me is in these words—'all drafts drawn by Geo. C. Hotchkiss will be duly

honored and paid by me, should he meet with any misfortune that he will not be able to do it himself.' This is not an assurance that G. C. H. was then a solvent person and that he was good for the amount, but a promise if he should not pay it that the defendant would. It does not warrant the solvency of the principal, but guaranties the payment of the debt. It says nothing or imports nothing at all of the then present ability of George C. Hotchkiss, but expressly stipulates the payment of the debt when due, if from misfortune he should not be able in his own person to satisfy the demand. This may be a slender, perhaps an imaginary distinction, but it is one evidently recognized in our law. This word misfortune comprehends any cause which may prevent the principal from paying the debt. The defendant, in short, undertook to pay the amount of the drafts, if the principal should not be able to do it himself. It was not therefore necessary for the plaintiffs to prove that they had exhausted their remedy against G. C. H.; it was only necessary to show that the drafts had not been paid when they became due. The next objection is, that the guaranty does not sufficiently state a consideration. The complaint, in substance, states that the defendant, in August 1853, introduced G. C. H. to the plaintiffs and solicited them to permit the said G. C. H. to make drafts on them on wheat, which he proposed to consign to the plaintiffs in New York, to sell for him on commission. That for the purpose of securing the plaintiffs, the defendant addressed a letter to them containing the words which I have already quoted. It is contended that this case comes within the decision of *Brewster* v. *Silence*, (4 *Seld.* 207;) but it may with much greater truth be insisted that it comes within the decision of the *Union Bank* v. *Coster's Ex'rs*, (3 *Coms.* 202;) and the still more recent case of *Gates* v. *McKee*, (3 *Kern.* 232.) The consideration in this last case is stated almost precisely in the same terms as the case in this guaranty. In the one it is, 'I will be responsible for what stock M. E. McKee has had, or may want hereafter, to the amount of $500.' In the case

before us the language is, 'all drafts drawn by G. C. H. will be duly honored and paid by me,' &c. The consideration in the one is stock to be delivered, in the other, money to be advanced on the drafts. In this case the transaction set forth in the complaint shows that the drafts were to be honored by the plaintiffs, on wheat to be consigned to them; and if there is any thing ambiguous in the language of the defendant's letter, according to well established principles reiterated in the cases to which I have referred, "parol evidence of the circumstances under which the contract was made may be given." Both the circumstances and the contract constitute in the present case a full and perfect consideration, and are distinctly set forth in the complaint. *Brewster* v. *Silence* presented a guaranty, without stating on its face any consideration, and the question seemed to be whether the note and guaranty should be treated as constituting one instrument. The court say that the words value received would probably have sufficed: but as the guaranty did not embrace any such words, and as the note was treated as a distinct pre-existing and separate instrument, it was held that as the contract of guaranty stated no consideration or satisfactory reference to the consideration, it was void by the statute of frauds There may be a conflict in some respects between this case and that of *Gates* v. *McKee*, and of the *Union Bank* v. *Coster's Ex'rs*, but I have no hesitation in yielding my homage, if there is a conflict, to these cases, in preference to that of *Brewster* v. *Silence*."

From the order made in accordance with this opinion, the defendant appealed.

Ely & Farnell, for the appellant.

Platt, Gerard & Buckley, for the respondent.

By the Court, MITCHELL, P. J. The guaranty, or rather promise, by the defendant, was that "all drafts drawn by

Geo. C. Hotchkiss will be duly *honored* and paid by *me*, should he meet with any misfortune that he will not be able *to do it* himself." The defendant insists that this is a guaranty only to pay if the amount cannot be collected of Geo. C. Hotchkiss. It is hardly necessary to add any thing to the opinion given at the special term. But it is very plain that the defendant promised to honor and pay the draft, should Hotchkiss not be able to do it; that is, should Hotchkiss not be able both to *honor* and pay the draft. When Hotchkiss failed to cause the drafts to be paid at maturity, by some one else than the plaintiffs, he failed to honor and pay them. And this, it is to be assumed, is the misfortune referred to in the guaranty, and on that failure the defendant's agreement was express that he would *honor* and pay the drafts. A draft is not honored when it is allowed to be protested; nor is it honored by the drawer for whose accommodation it is drawn, when he leaves it to the accommodation acceptor to pay it, and does not supply the latter with funds.

The judgment for the plaintiff should be affirmed, with costs.

[New York General Term, November 2, 1857. *Mitchell, Clerke* and *Davies*, Justices.]

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26 68
37h 248
25a 424

Simon Simmons and Daniel Fisher, *appellants*, *vs.* Peter Simmons and others, *respondents*.

A will which makes a full disposition of all the testator's property is inconsistent with the valid existence of any prior will, and therefore amounts to a revocation of all wills previously executed.

THIS was an appeal from the decree of the surrogate of the county of Albany, admitting to probate a paper purporting to be the last will and testament of Peter Simmons, late

of the town of New Scotland, deceased. The appellants are heirs at law and next of kin of the deceased, who died possessed of real and personal property amounting in value to $20,000 or $25,000. Peter Simmons left at his death three testamentary papers, all duly executed and disposing of his property. The first was dated September 14th, 1852; the second in April, 1855; and the third on the 16th day of July, 1855; in each of which Peter Simmons, jun. and Tunis Houghtaling were named as executors. Neither of the last two in terms revoked former wills. In the month of April, 1855, S. Van Santvoord wrote a second will for the testator, and it was duly executed and published. In July, after the execution of the will propounded for probate, Van Santvoord, alone and not in the presence of the testator or any one else, burnt up the will of April, 1855. The surrogate, by his decree, admitted the will last executed, (July 16, 1855,) to probate as the will of the testator, and from that decree the appeal was taken to this court.

John H. Reynolds, for the appellants. I. The testator having executed at different times three testamentary papers, the last two of which having no clause in terms revoking former wills, neither of the prior wills were revoked, except so far as the provisions of those last executed were inconsistent with those prior in point of date and execution, and all three of the testamentary papers, taken together, constitute the last will and testament of the deceased, and one of them cannot be admitted to probate without the others; they must all be admitted, or none. (1.) The execution of a subsequent will, without an express clause of revocation, does not revoke a prior will, except so far as the provisions of the last are inconsistent with the former. (2 *R. S.* 246, § 35, *4th ed. Nelson* v. *McGiffert*, 3 *Barb. Ch.* 164. *Brant* v. *Wilson*, 8 *Cowen*, 56. *Dayton's Surrogate*, 124, *2d ed. and cases cited.*) (2.) All three of the wills shown to have been executed by the testator, taken together, constitute the last will and testament of the deceased.

(*Campbell* v. *Logan*, 2 *Bradford*, 90. *Dayton's Surrogate*, 125, 2*d ed.*) (3.) Subsequent wills not in terms revoking former wills have the same effect as codicils, and taken all together amount to a last will and testament. (4.) The surrogate's court has no authority to admit to probate a part of a last will and testament and issue letters thereon. The whole will must be admitted, or no part of it. There can be but one last will, and that is an entire thing. The term "will," includes every thing necessary to make it complete. (*Dayton's Surrogate*, 45, 2*d ed.* 2 *R. S.* 68, §§ 71, 78.)

II. The destruction by Van Santvoord of the will of April, 1855, did not operate to revoke, cancel or destroy it. The statute was not complied with. (2 *R. S.* 64, § 35, 4*th ed.*; 246, § 42. *Dayton's Surrogate*, 127, 2*d ed.*) (1.) It hence follows, that this paper is a part of the testator's last will and testament, and must be established before any part of the will can take effect, or letters testamentary be granted. (2.) And a part of the will being destroyed, the surrogate has no jurisdiction to take proof of it. It must be proved in the supreme court. (2 *R. S.* 253, § 84, 2*d ed.*) (3.) The surrogate cannot take proof of part of a will, and the supreme court of another part; as there is but one last will, it must be proved in one court as an entire thing, and not in different courts by installments. (4.) When the several testamentary papers, constituting the last will of the testator, are proved in the court competent to establish it, it will be construed according to its legal effect and executed. It is the business of the surrogate to establish the testamentary character of the paper, leaving the legal effect to be determined by the supreme court, if any question shall arise thereon.

John K. Porter, for the respondents. I. The objection that the will was preceded by other wills unrevoked, cannot be urged on appeal, not being embraced in the allegations filed by the contestants in the court below.

II. The instrument produced, being upon its face a perfect

will, made by a competent testator, and proved to have been duly executed, and unrevoked, the surrogate was bound to admit it to probate; and if the contestants desire to limit and qualify its effect by any former wills, they must produce and prove them. (2 *R. S.* 58, § 14.) (1.) Whether there were or were not prior wills in force, this will at all events was unrevoked, and the claimants under it were entitled, on compliance with the conditions of the statute, to have the evidence of their rights under it recorded. (2.) The surrogate had no right to reject it without proof that the will propounded was no longer in force. (3.) The burden is upon the contestants to propound for probate any prior will which they suppose to enlarge or qualify the operation of the last testamentary act of the testator. (4.) The probate of this will in no manner concludes the contestants from propounding other wills, and if they should be admitted to probate, it would be the duty of the surrogate to modify the decree accordingly. (*Campbell* v. *Logan*, 2 *Bradf.* 90, 94.) (5.) But until such wills were propounded the surrogate had no jurisdiction, except to decide whether this will was duly executed by a competent testator, and unrevoked at his death.

III. The former wills were not in force at the death of the testator, but were entirely superseded by his last will. (1.) The will of July, 1855, was perfect and complete in itself and withdrew the entire estate, real as well as personal, from the operation of all previous wills. The testator in this will made certain specific devises and bequests, and after enumerating these *excluded all others*, by giving the entire residue of his real and personal property to his legal heirs, *pro rata*. The will provides only, and that in terms, for the payment of "the legacies herein specified." (2.) He had an unquestionable right to supersede the former wills, and revoke and alter them throughout, by executing a new will declaring such revocation or alteration; and this he did in a most unmistakeable form. (2 *R. S.* 64, § 42.) The statute does not exact a revocation, in terms, of former wills, but requires the testator to make

known, by will or other writing duly executed, the revocation or alteration, as the case may be. He is not required by the statute to declare the fact that he has made former wills, and then repudiate them, but to declare his will that they shall remain no longer in force, which he may do effectually by withdrawing his property from their operation, and excluding claimants under them, by a new disposition of what was previously given to them. This, like the other kindred provisions of the statute of wills, looks to substance and not to form, and so the courts have uniformly held on questions arising under that statute. (*Torry* v. *Bowen*, 15 *Barb.* 304. *Brown* v. *De Selding*, 4 *Sandf. S. C. R.* 10. *Remsen* v. *Brinckerhoff*, 26 *Wend.* 332. *Tonnele* v. *Hall*, 4 *Comst.* 140.) By publishing a new and independent will, *inconsistent* with those which preceded it, he publishes and declares his revocation of all previous wills. (*Nelson* v. *McGiffert*, 3 *Barb. Ch.* 158. 15 *Eng. Law and Eq. R.* 283; 60 *Eng. Com. Law. Honfrey* v. *Honfrey*, 4 *Moore*, 29; 6 *Jurist*, 355, *S. C.* 4 *Kent*, 528.) A subsequent will does not revoke a former one unless it contains a clause of revocation, or is inconsistent with it. (3 *Barb. Ch.* 158, 164.) A second will is a revocation of a former one, provided it contains words expressly revoking it, or makes a different or incompatible disposition of the property. (4 *Kent*, 528.) This will stands, and was designed to stand, alone. The intent expressed is, to give nothing to either of the beneficiaries, (and they are identical in all the wills,) except what is specifically provided in the last will. The rule that when the inconsistency is only in respect to particular clauses, it works merely a revocation *pro tanto*, applies only where there are provisions in the first will which may be superadded to those of the last, consistently with the apparent intent of the testator. But when, as in this case, the testator exhausts the entire property, and makes a new partition throughout between the beneficiaries, the inconsistency is not between jarring clauses, but between entire and independent schemes of distribution. That the first two wills are in their general scope

wholly incompatible with the last, and that the three cannot stand together except as three incongruous wills, is apparent from the foregoing comparison of their provisions in the statement. (3.) The intent of entire revocation and substitution is evinced not only by a comparison of the three instruments, but by the language of the testator in his last will, whether construed with or without reference to the antecedent and surrounding circumstances. He not only dictated, executed and acknowledged it as his last will and testament, but he made a new disposition of all he had to give, and provided without exception for every claimant on his bounty. He was aware of the distinction between a codicil and a new will, and preferred to make a new will. The changes in each case were material, and required a revision of the entire will, and an apportionment upon a new basis. In each, he weighed anew the claims of his respective heirs, and the successive changes were, for satisfactory reasons, generally stated by him at the time, and when not stated, obvious from the surrounding circumstances. His acts assumed a revocation of the prior wills. He wished Van Santvoord to put the first out of the way when he deposited the substituted will with the magistrate. On the execution of the *last* will, the second was burnt, and by the direction of the testator. (*See Betts* v. *Jackson*, 6 *Wend.* 173.)

By the Court, GOULD, J. The due execution of what purports to be Peter Simmons' last will and testament, on the 14th day of July, 1855, is sufficiently proved. On that point the parties before us agree. They also agree that in April 1855, Peter Simmons duly made and executed *a* last will and testament; which in July, 1855, (soon after the execution of the will first named, and on the same day,) was destroyed by the testator's direction, but not in his presence; he being in an adjoining room. The contents of this will are not proved. A will duly executed by the same testator, dated September 14th, 1852, is also admitted in evidence; which purports to

dispose of the testator's whole property. The will of July 14th, 1855, after giving sundry legacies, and making some specific devises, divides in equal shares among his "legal heirs, nine in number, *the residue of his real and personal estate;* and then provides that its legacies are to be paid "out of bonds and notes in his possession, and any real estate not herein disposed of;" that is, not *specifically* disposed of.

The respondents claim that the will of July, 1855, was properly admitted to probate, by the surrogate of Albany county; and that his decree, so admitting it, should be affirmed. The appellants claim that the *three* testamentary instruments, *together*, constitute *the will;* and must all stand as *one will.* And, since that of April, 1855, confessedly, cannot be proved in detail, that *there is a whole will incapable of proof;* hence the testator is to be pronounced intestate; and the surrogate's decree must be reversed.

The argument before us proceeded upon the assumption that the revised statutes (2 *R. S. 4th ed.* 246, § 35,) had so entirely *altered* the law, in respect to the revocation of wills, that the English cases, and our own older decisions, are inapplicable. This is an entire mistake. The section referred to says "no will in writing," (except, &c., to which *exception* special attention will be hereinafter called,) "nor any part thereof shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation," &c. The revised laws of 1813 (1 *R. L.* 365, § 3,) say "no such last will and testament duly executed, &c. or any part thereof, shall be revocable, or be altered, otherwise than by some other will or codicil in writing, or other writing of the party to such last will and testament, declaring the same," &c. The marginal reference of the revisers is to the English statute 29th Charles 2d, ch. 3, § 6; which 6th section is, "no *devise* in writing, &c. or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same," &c. (*Wilson*, 515.) So that the English cases, and all cases in our

own courts, have been decided on the revocations of wills, under the same statute that we now have. And the whole doctrine of *constructive revocations* has grown up under a prescribed rule as strict as the one that now governs us; and that doctrine is the doctrine of our common law, as well as that of the revised statutes.

It should be observed that, between a codicil and a subsequent will, there is this difference of construction; a codicil is a republication and ratification of so much of the prior will as it does not revoke; whereas a new will, (if it provides for a full disposition of all the testator's estate,) though inconsistent but *in part* with the former will, and absolutely agreeing in part, revokes the whole prior will, by substituting a new and last disposition for the former one; since it must revoke in part, (so far as inconsistent;) and it were merely idle to continue the former one in force for those parts which are fully carried into effect by the new one. (*Powell on Dev.* 543, 4. *Vesey*, 187.) Note, also, 3 *Wilson*, 515, and the same case reversed, 2 *Bl. Rep.* 937; which although deciding—where the new will was not produced and its contents were not known—that merely a "different disposition" (where that phrase, so limited, was found by special verdict) by a new will would not absolutely revoke a former will, (produced and proved;) yet plainly shows that, had the new will been produced, and its provisions even but in respect to the part of the property in question been shown to be inconsistent with the former one, it would have been held a revocation. The common sense of it seems to be clearly stated (though but in the argument) in 3 *Wilson*, 506: "It is certain no man can die with two wills;" (*i. e.* two wills as to the same subject matter, as in the case before us, each disposing of his whole property;) "the last must prevail."

The statute of Charles 2d (as quoted) would seem to show that our present statute has been, to some extent, misunderstood. For while "some other will or codicil in writing" does, by the more apparent reading of the statute itself, as well as

by the whole current of English decisions upon that statute, always work a revocation where its provisions are inconsistent with the former will; if the revocation is to be by some writing other than a will or codicil, it must be by "other writing declaring the same." The "declaring" (as necessary to revocation) applies to the "other writing" only, and not to the other will, &c.; although a revoking clause may be, and frequently is, inserted in a will or codicil, "from abundant caution."

Let us now refer to the *exception* in the revised statutes, of which a word has been said, in passing; (2 *R. S. 4th ed.* 246, § 35,) "no will in writing except in the cases hereinafter mentioned." Then immediately follow ten consecutive sections, with provisions as to total and partial revocations; and then follows the 46th section, (*p.* 248,) as to reviving a revoked will: "If, after the making of any will, the testator shall duly make and execute a second will, the destruction, canceling, or revocation of such second will,"(*a*) "shall not revive the first will, unless it appears by the terms of such revocation, that it was his intention to revive, and give effect to his first will;" or, unless he then republish the first. Here, by legislative and simultaneous construction, a second will "duly made and executed," (without any clause declaring the former one revoked,) is shown to have put the first so utterly out of vital existence, that it needs either republication (tantamount to an entirely new execution) or an express revivor by the terms of the writing revoking the second. Whether this section be considered as the last of the excepted cases (of § 35,) or as a new and substantive construction of section 35, its effect is the same. And here the revisers did alter our law and the English. And a consideration of the English rule, as

(*a*) The revisers here manifestly use the word "will" (unqualified) as *ex vi termini* meaning a complete disposition of the testator's whole property, and therefore any second one is necessarily a revocation of any former will. Observe, also, in contradistinction, that the English statute speaks of revoking a *devise*, not necessarily a *will*.

by their decisions, (their statute having no such provision,) shows the view, taken above, of this latter section, is the true one. For while, in England, if a former will were (in law) revoked by a subsequent one, on the ground of inconsistency alone, an express revocation of the latter (or its proper canceling, or destruction,) *ipso facto* revived the former, if it remained in existence; (*Perkins*, § 479; 4 *Burr.* 2512; *Powell on Dev.* 549;) still, if the second in terms expressly revoked the first, a revocation or destruction of the second did not revive the first. By the independent substantive act of express revocation, the first became immediately void, even though it remained in existence. (*Powell on Dev.* 551. *Doug.* 40. *Cowp.* 53. *See also* 2 *Dallas*, 266; 3 *Conn.* 576.) The *dictum* in *Cowper*, 92, by Lord Mansfield, in a case where the point did not arise, cannot prevail against his own decision. (*Cowp.* 53.)

Further, our own courts, since the revised statutes, plainly hold, in regard to the whole matter of wills and their execution, that the *substance* of the testator's *intention*—if manifested by such acts as the law recognizes—is to govern, in preference to any *formal* or *literal* following of the words of the statutes. (*See* 26 *Wend.* 332; 3 *Barb. Ch.* 164; 15 *Barb.* 304; 4 *Comst.* 145.)

In view of these principles, both of plain statute construction, (§ 46, as above,) and of reiterated decisions on just such a statute as ours, I am unable to see how the will of July, 1855, which clearly provides for a full disposition of all the testator's property, can be held otherwise than inconsistent with even the valid existence of any prior will. I think the surrogate's decree should be affirmed.

Judgment affirmed.

[Albany General Term, December 7, 1857. *W. B. Wright*, *Harris* and *Gould*, Justices.]

THE PEOPLE, *ex rel.* Wm. H. Burroughs, *vs.* JAMES C. WILLETT, sheriff.

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An action on the custom, against an innkeeper, for the loss of the baggage of his guest, is founded on tort. It is not for "injuring or for wrongfully taking, detaining or converting personal property;" but the gist of the action is tortious negligence in keeping the property.

In such an action a defendant may be held to bail under the code, (§ 179, *sub.* 1,) when he "is not a resident of the state or is about to remove therefrom," it being "on a cause of action not arising on contract." When he has not been arrested before judgment, an execution cannot properly be issued against his body (*Code*, § 288) on the judgment, without an order of the court.

Such a judgment does not show a case for arrest, inasmuch as it does not show the non-residence of the defendant, or his intent to depart the state.

The regularity and propriety of such an arrest may be inquired into on *habeas corpus*.

A defendant so imprisoned should be discharged on *habeas corpus* if it appears that the process on which he is detained has been issued in a case not allowed by law, or where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law.

MOTION, upon a writ of *habeas corpus*, for the discharge of the relator from arrest.

John E. Burrill, for the relator.

Charles Tracy, for the defendant.

PEABODY, J. The relator is detained by virtue of an execution against his body, issued on a final judgment against him. The judgment was recovered for the value of a traveling bag and contents, deposited with him for safe keeping, as innkeeper of the Irving House in this city, the plaintiff therein being a guest at said house. The action was brought upon the custom of this state, which is alleged to be, that innkeepers are bound to keep safely such property for their guests. The breach alleged, for which the judgment is recovered, is that "defendant did not keep said bag and contents safely and without diminution, but on the contrary he and his serv-

ants so negligently and carelessly behaved and conducted, that said bag and contents were by mere carelessness of defendant and his servants, carried away by some person unknown, and were wholly lost to plaintiff."

On this judgment an execution against the body of the defendant was issued, on which he is now in custody. The question on which the legality of the imprisonment depends is whether the execution against his body was authorized by the judgment. But there is a preliminary question here, viz: whether the regularity or propriety of that process can be inquired into in this proceeding on *habeas corpus*. Section 22, subdivision 2, of the *habeas corpus* act, (2 *R. S.* 563,) provides that persons detained by virtue of the final judgment of any competent tribunal, or of any execution issued on such judgment or decree, are not entitled to prosecute the writ. It is said that the relator comes within this class, and therefore cannot prosecute this writ. Whether he is held by virtue of an execution on a final judgment of a competent tribunal is the question raised by the preliminary objection, and the question on the merits is very much the same. The mere claim that he is so held should not, I think, conclude me. There is a case, however, in 18 *John.* 305, (*Bank of U. S.* v. *Jenkins*,) which seems to indicate that a writ of *habeas corpus* is not the proper remedy for a person detained in this manner; and that is the principal authority on the subject. There is a difference in the cases, however. In that case, as in this, the principal question was whether the *ca. sa.* was regularly issued. There, the objection to the regularity was that the foundation for it had not been laid by a previous execution against the property to the proper county. Here, the objection is that it is not warranted by the judgment, in its own nature; In those days an execution upon a judgment was issued by the court, theoretically at least. It had to be sealed and signed by the clerk. Now it is not even in theory issued by the court, but by the party or his attorney. That case, moreover, seems to have been but little considered. The court be-

fore whom it was brought had just denied the same relief on motion in the suit, or rather had granted it on terms which the applicant would not accept, and although the court said the writ was not the proper remedy, they did nevertheless on the same motion direct the order previously made to be modified so as to give unconditionally all the relief sought. It was therefore an election of the court in which way it would give the relief, perhaps, or a refusal to review on this writ a decision just made in a different proceeding, rather than an adjudication against the propriety of the writ, which should be deemed an authority that it is not a proper remedy in such a case. The relief asked was granted, but was credited to the account of a motion previously made and decided, rather than to that of the writ itself, although that was the only proceeding before the court at the time. Moreover, that case was before the revised statutes, under an act of 1813 not entirely similar to the present act. I am not inclined, under all the circumstances of that case, to defer to it as a controlling authority, but I shall examine to see whether the relator is detained by virtue of an execution upon a judgment of a competent tribunal. I am more ready to adopt this course, because I find in section 41 of the same act, (2 *R. S.* 568,) that a person may be discharged on this writ from custody by virtue of civil process from a court legally constituted, (*subd.* 4,) when the process, though in proper form, has been issued in a case not allowed by law, (*subd.* 6,) "when the process is not authorized by any judgment, &c. of any court, or any provision of law." Whether process which is set up as a justification for detention has been issued in a case allowed by law, and whether it is authorized by any judgment of a court, therefore, I am authorized by those provisions of the statute to inquire, and a decision of these questions is all that will be necessary to dispose of the matter before me.

The judgment and execution are before me, and the remaining question is whether, on the whole, this execution on such a judgment is authorized in law. The suit was brought to

recover the value of certain articles, on the ground that the defendant was bound, by the custom of this state, to receive and safely keep the property of his guests, and that having received that of the plaintiff he kept it so negligently that it was lost. This custom of the realm would seem, in the absence of express contract, to take the place of it, and an action for not preserving the property according to it, would seem to be in the nature of an action for breach of contract. But on a more careful consideration, the grounds of the action appear to be, not the failure to keep safely and restore the property, which would probably be only a breach of implied contract, but the negligent, careless and improper behavior and conduct of the defendant, the wrongful (tortious) conduct of defendant and his agents, (negative perhaps, to be sure, but nevertheless wrongful and tortious,) by which the property was lost to the plaintiff. This negligent, careless, and therefore wrongful and tortious conduct, rather than the failure to fulfill the contract, is the ground of action. (*See Burkle* v. *Ells*, 4 *How. Pr.* 288; *Bank of Orange* v. *Brown*, 3 *Wend.* 158; *Brotherton* v. *Wood*, 3 *Brod. & Bing.* 54; 2 *Lord Raymond*, 909; 2 *Ct. Pl.* 150, 320; *Hallenbake* v. *Fish*, 8 *Wend.* 547; 4 *id.* 618.)

In the cases above cited it is settled that an action on the custom is founded on the tort or misfeasance, and not on the contract, express or implied, which often attends the transaction, and is in many of the cases given in evidence. It is often difficult to determine whether the action is on the contract or on the custom, and the confusion seems to have arisen from the difficulty in ascertaining which constituted the basis of the action, the custom or the contract, rather than whether an action ascertained to be on the custom, was founded on tort or on contract. (3 *Wend.* 168.)

The suit against Burroughs, being on the custom, was founded on tort; the judgment record shows this fact. With this fact apparent, was the execution properly issued against the body of the defendant? Under the non-imprisonment

act, (*Laws of* 1831, *p.* 396,) by which this question would have been controlled prior to the code, he would have been liable to arrest; for, under that, a defendant in an action in tort could be held to bail. (*Burkle* v. *Ells*, 4 *How. Pr.* 288.) But by the code, which now embraces the law on the subject, the only provision under which there is any pretense for the claim, is contained in section 179, sub. 1, which authorizes the arrest of a party "in an action * * * * on a cause of action not arising out of contract, where the defendant is not a resident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring or wrongfully taking, detaining or converting property." It does not appear that the defendant is not a resident of this state, or being so is about to remove therefrom; nor does it appear that the action is for an injury to person or character, or for wrongfully taking, detaining or converting property, and it only remains to be considered whether it is for injuring property. On this subject the decision of the superior court, in *Tracy* v. *Leland*, (2 *Sand. S. C. R.* 729,) which has not, that I am aware, been overruled, seems to relieve us of all doubt, and leads to the conclusion that this is not an action for an injury to property. The relator was not liable to arrest, by the judgment as entered; at any rate, without an order from a judge; and whether it was a proper case for an order, cannot be decided here, for the facts do not appear. He certainly was not, in the view I have taken of the case, unless some other fact, such as non-residence or an intent to remove from the state, be superadded to all that appears in the judgment record before me. He could not, therefore, have been arrested, on the facts shown to me, under §§ 179 and 181, before judgment, and it follows, from § 288, that he was not properly arrested on the judgment obtained in that suit, and he therefore must be discharged.

My conclusions are,

First. That on this writ of *habeas corpus* I am authorized to inquire, 1. Whether the process, though proper in form,

is allowed by law in this case ; (2 *R. S.* 568, § 43, *sub.* 4 ;) and 2. Whether the process is authorized by a judgment, order or decree of a court, or by a provision of law. (*Id.* § 43, *sub.* 6.)

Second. That an action on the custom, against an innkeeper or common carrier, is founded in tort or misfeasance, and not on contract.

Third. That in such an action a defendant cannot properly be held to bail, except under § 179, by order of a judge, on proof, *in addition to the facts constituting the cause of action,* that the defendant is a non-resident of the state, or is about to remove thereout.

Fourth. That as the record of judgment in such a case does not show all the facts necessary to authorize an arrest in the suit before judgment, execution against the body cannot properly be issued on it, at least without the order of a judge, and on proof of the additional facts required to entitle the plaintiff to it.

[New York Special Term, December 7, 1857. *Peabody,* Justice.]

Ayrault *vs.* Chamberlin and Wood.

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54 432
59 352

Where a partnership between attorneys is dissolved after they have commenced a suit to foreclose a mortgage, and a new partnership is formed, consisting of one of the members of the old firm, and a new member, and the latter goes out of the firm and transfers his interest in the costs, before the money is collected in the foreclosure suit, the member thus retiring is not liable for the default of his former partner in not paying over the money subsequently received by him.

W. & Y., who were partners in the practice of the law, were employed by the plaintiff as his attorneys, to collect a bond and mortgage given by E., and they commenced a suit for that purpose. During its progress, the partnership was dissolved, and C. & W. formed a new partnership as the successors of W. & Y., and continued the same for several years, when it was dissolved, and C. retired therefrom, W. continuing to practice as an attorney, in con-

nection with K. Nearly a year after this dissolution, the money due upon the E. mortgage was collected and paid over to W. as the plaintiff's attorney on record. *Held* that the money having been collected long after the partnership between C. & W. had been dissolved, and the interest of C. therein had ceased, and there being no evidence of any new retainer, or any agreement to substitute C. & W. for the original attorneys, the relation of attorney and client was not subsisting in respect to that action, as between the plaintiff and C. when the money was paid to W.; and that therefore a joint action would not lie against C. & W. to recover the money so collected.

Held also, that before C. could be made liable, under such circumstances, for the default of W., it must be affirmatively shown that the new firm of C. & W. was in fact, by some agreement or understanding to which the plaintiff was a party, substituted for the old firm of W. & Y. in the foreclosure suit.

APPEAL by the defendants from a judgment entered upon the report of a referee.

There was no dispute between the parties as to the principal facts in this case. In the year 1844 the defendant Wood and John Young were partners in the practice of the law, and were retained by the plaintiff to foreclose a mortgage given by Alanson Elmer. They commenced a suit for that purpose, before the vice chancellor of the eighth circuit, in which Elmer appeared and put in the defense of usury. The cause was brought to a hearing before the vice chancellor and decided against the plaintiff. The cause was afterwards heard on appeal, by the supreme court, and decided in favor of the plaintiff, and was then carried by the defendant to the court of appeals, where the judgment of the supreme court was affirmed. In all these proceedings Mr. Wood alone appeared on the record as the solicitor and attorney for the plaintiff, and Mr. Young, Mr. Wood and Mr. Hastings, acted as the counsel. At the close of the year 1846, Young & Wood dissolved their copartnership, and the defendants, on the first day of January, 1847, formed a copartnership as attorneys and counsellors at law, and advertised themselves as the successors of Young & Wood. In June, 1847, the defendant Chamberlin purchased the interest of Mr. Young in the joint business of Young & Wood. The defendants continued to

carry on the business together as copartners until the 1st day of January, 1854, when their copartnership was dissolved, and the defendant Wood formed another copartnership with Joseph Kershner. In December, 1854, the money claimed in this action was collected of Elmer, and received by the defendant Wood, who had in the mean time become the assignee from the defendant Chamberlin, of all their claims against the plaintiff for legal services, and when called upon by the plaintiff to pay over the money so collected, declined to do it until these claims were adjusted. In November, 1849, an account for legal services, made up by the defendant Wood, was settled by the defendant Chamberlin. This account contained several items for services, &c. in the foreclosure suit against Elmer. No other proof was given by the plaintiff to show a joint retainer of the defendants in the foreclosure suit by the plaintiff, except that they continued to do business for him as Young & Wood had previously done. The defendant Chamberlin having been examined as a witness on the part of the plaintiff, the defendant Wood was examined in his own behalf, and testified that Chamberlin never had any thing to do with the foreclosure suit against Elmer, and that the plaintiff repeatedly told him that he did not wish him to have any thing to do with it.

This action was brought against Chamberlin & Wood, jointly, to recover the amount collected of Elmer in the foreclosure suit. The referee reported in favor of the plaintiff for the amount claimed by him, including interest and costs.

O. Hastings, for the appellants.

Scott Lord, for the respondent.

By the Court, JOHNSON, J. After a careful and deliberate examination of the questions involved in this case, I have come to the conclusion that the action cannot be maintained against the defendants jointly, upon the facts found by the referee. The defendant Chamberlin was not originally re-

tained by the plaintiff, and had no connection whatever with the action, and no interest in it, until after it was brought and had been some time in process. The attorneys employed by the plaintiff to collect the demand were the defendant Wood, and his then partner, the late Gov. Young. The action was commenced by them, and while it was pending, their partnership was dissolved, and a new one formed between the defendants. The defendant Chamberlin purchased Young's interest in the unfinished business, which included the action in question. The defendant Wood was the attorney of record, throughout. The defendants dissolved their partnership on the 1st of January, 1854. It does not appear, expressly, from the case, whether this was before or after the final decree in the action. On such dissolution Wood purchased Chamberlin's interest in that action. After final decree in the action, and on or about the 1st of December, 1854, the money in question was paid to Wood, the attorney of record, who immediately gave the plaintiff notice of its collection, but refused to pay it over on demand, claiming to have an account to a considerable amount against the plaintiff, and offering only to pay the balance after taking such account. While the defendants continued partners, the action was prosecuted by them for their joint benefit, in the name of Wood. The referee has found, as matter of fact, that the relation of attorney and client existed between the plaintiff and defendants in the continuance and prosecution of such action to final judgment. From this I infer that the dissolution of the copartnership between the defendants was not until after the final decree in the action, though I find nothing in the evidence, on the subject, one way or the other. It is not found as a fact, however, that the relation subsisted between Chamberlin and the plaintiff when the money was paid over to Wood, nor do I see how it could have been, from the evidence. The general rule is that the power and authority of an attorney by virtue of his retainer, ceases when final judgment is obtained, and that it continues after

that, for certain purposes only. (*Ex parte Shumway*, 4 *Denio*, 258. *Jackson* v. *Bartlett*, 8 *John.* 361. *Lusk* v. *Hastings*, 1 *Hill*, 656.) After judgment is perfected in an action, the plaintiff may have his execution issued by any other attorney, without any substitution. (*Thorp* v. *Fowler*, 5 *Cowen*, 446.) Previous to judgment, however, no attorney, other than the attorney of record, can act in the cause without a regular substitution. (*Boeram* v. *Jerome*, 1 *Wend.* 293.)

I take it for granted that the decree was the ordinary decree of foreclosure; and also that the money was paid by the defendant therein, before a sale, as nothing appears respecting any sale under the decree. The money might as well have been paid to the plaintiff. It was not necessarily paid to the attorney of record. This, however, can make no difference, if the defendant Chamberlin was really retained by the plaintiff, and became in fact, and in law, one of his attorneys as to that action. If he became the attorney, with his partner Wood, in that action, by virtue of any new stipulation or agreement, between himself and the plaintiff, it would, I have no doubt, be equivalent to an original retainer. There would then be some privity of contract between the plaintiff and the defendants, and they might be jointly liable in an action for any moneys collected under the new retainer. But how is this? When an attorney is retained by a party to collect a demand by course of legal proceedings, the law implies a contract between them, by which the attorney on his part engages to use proper skill and dilligence, and to pay over all moneys which may come to his hands, from such demand, belonging to his client. The plaintiff retained Young & Wood to collect the demand in question. The agreement was between them. When the defendants entered into their partnership, this agreement was subsisting and in full force. Has it been in any respect changed? There is not the slightest evidence that the plaintiff ever released Young & Wood, or that Chamberlin ever assumed any of their obligations to him.

Merely purchasing an interest in the business, and entering into partnership with one of them, did not make him liable for their debts or obligations. Those still continued, against the old firm, and before Chamberlin can be charged upon their undertakings, a new agreement must be shown, sufficient in law to create the obligation. If he had come in, as a new partner into the old firm, he would not have been liable jointly with them, without an express promise. This is well settled. (*Story on Part.* §§ 152, 153.) The presumption of law is against the liability of the new partner, for the plain reason that there is a subsisting agreement in reference to the same matter, binding upon other parties. And before any one can be made answerable for the debt, default, or miscarriage of another who is already bound, he must have agreed in writing, in which the consideration is expressed. Chamberlin never in fact received the money. He came in while the action was in progress, and went out and transferred all his interest in the costs, nearly a year before the money was paid. Before he can be made liable, therefore, in such a case, it must be affirmatively shown that the new firm was in fact by some agreement, or understanding, to which the plaintiff was a party, substituted for the old one, in the action. This fact is not found, and there is no evidence on the subject. Indeed the evidence is all the other way. All that is shown is that the defendants claimed the costs, and some costs, in the progress of the action, were paid by the plaintiff. It does not follow from this, however, that there was any privity of contract between the plaintiff and the defendants as a new firm. Chamberlin had purchased Young's interest, and the defendants were legally entitled to the costs, at the time the claim was made, independent entirely of any substitution, or any change of the original undertaking, as between the plaintiff and the old firm. If the fact might have been inferred from the treatment of the matter between the parties, such inference of fact has not been drawn.

The referee has merely found that the relation of attorney

and client existed, up to the time of perfecting judgment. And I incline to the opinion that as respects Chamberlin there was a quasi relation, of that character, up to the time of the dissolution. He had an interest in the action, and I have no doubt that had this money come into the hands of the firm while he was a member, this action might have been maintained; or an attachment might have been issued against him, in case of a refusal to pay it over. But that might have been, upon a new duty, or assumpsit, and without any implied antecedent agreement.

In *Platt* v. *Halen*, (23 *Wend.* 456,) the partner of the attorney of record was held to stand in the situation of a dormant partner. And in that case the two attorneys were partners, when the bill was filed in the name of one as attorney of record. Chief Justice Nelson thought the same point had been before decided by the court. If Stevens was a dormant partner in that case, it is certain that Chamberlin must have been in this action, as respects the plaintiff. And as a dormant partner coming in and taking an interest in an undertaking already in progress, where the parties were already standing in fixed and definite legal relations towards each other, and going out and disposing of his interest before such undertaking is entirely completed, he would not be liable for a default occurring after thus going out. No notice is necessary of a dissolution, in the case of a dormant partner, to protect him from demands originating after the dissolution. (*Story on Part.* § 159. 3 *Kent's Com.* 68.)

Here it is certain that the default occurred long after the defendants dissolved, and the interest of Chamberlin had entirely ceased. And as there is no evidence of any new retainer, or any agreement to substitute the defendants for the original attorneys, I think it follows as matter of law, that the relation of attorney and client was not subsisting, in respect to that action, in any manner or for any purpose, as between the plaintiff and the defendant Chamberlin, when the money was paid over to the defendant Wood. That such relation had

always existed, between the plaintiff and Wood, from the time of the commencement of the action, and was still existing when he received the money, is not questioned. It follows that the action cannot be maintained against the defendants. A new trial must therefore be granted, with costs to abide the event.

[Monroe General Term, December 7, 1857. *Johnson, T. R. Strong* and *Welles*, Justices.]

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The Supervisors of Livingston County *vs.* McCartney, sheriff, &c.

Where a warrant is issued by a county treasurer, directed to the sheriff, commanding him to levy of the property of a town collector the amount of a tax which the collector has neglected to pay into the treasury, the sheriff, upon collecting the amount specified in the warrant, is entitled to deduct and retain, for his fees, the same per centage to which collectors are entitled; viz. five per cent.

CONTROVERSY submitted without action, by a stipulation between the parties, upon these facts:

On or about the 20th day of February, 1857, several town collectors of Livingston county being in default in not paying over the several sums of money which had been collected by them for taxes, the county treasurer of said county, pursuant to the statute, issued to the defendant six warrants against said collectors, respectively, of the same form, excepting the name and amount, as the following:

"Livingston County, ss.

The People of the state of New York to the sheriff of said county, greeting:

Whereas, Ira Rogers, the collector of taxes for the town of Leicester, in the said county of Livingston, has neglected to pay to the undersigned, the county treasurer of the said county of Livingston, the sum required by his warrant to be paid to the

said county treasurer, to wit: The sum of three thousand seven hundred and seventy dollars and fifty-three cents, (3770.53,) and has also neglected to account for the same as unpaid. And whereas the time when such payment ought to have been made has elapsed, you are therefore hereby commanded, in the name of the people aforesaid, to levy the said sum of three thousand seven hundred and seventy dollars and fifty-three cents, so unpaid and unaccounted for by the said collector, of the goods and chattels, lands and tenements of the said Ira Rogers, such collector, and to pay the same to the undersigned, county treasurer, and to return this warrant within forty days after the date hereof. Given under my hand and seal at Geneseo, in said county, this 20th day of February, 1857. C. R. Bond, Treasurer of Liv. County. } [L. S.]"

The five other warrants, in like form and bearing the same date of the above, issued and delivered to the sheriff, were against the other collectors who were in default, for different sums, amounting, in the aggregate, including the one above set forth, to the sum of $14,796.02.

Pursuant to the exigency of said warrants, and the statute in that behalf, the defendant, as such sheriff, proceeded to collect and did collect the several sums mentioned therein, of the aggregate amount aforesaid, and paid to the county treasurer all the moneys levied by virtue of said warrants, deducting the sum of five cents on each dollar for the fees of said defendant, and which sum so retained the defendant still retains for his fees as aforesaid; which sum so retained by him, for his said fees, amounts in the aggregate to the sum of $739.80. The question was whether the defendant was entitled to deduct and retain that sum, as his fees and commissions upon the amount collected.

Scott Lord, for the plaintiffs.

A. A. Hendee, for the defendant.

By the Court, JOHNSON, J. The statute requiring the sheriff to execute warrants like those issued by the treasurer in this case, and to pay to such treasurer the money levied by virtue thereof, authorizes him to deduct "for his fees the same compensation that the collectors would have been entitled to retain." (1 *R. S.* 400, § 14.)

When this section was enacted, a collector of taxes was entitled to five per cent for his fees for collecting. This per centage was then added to the tax, by the board of supervisors, and formed part of the aggregate of the tax, which the county treasurer charged to each collector, when the tax list and warrant was delivered to him by such board of supervisors. (1 *R. S.* 396, § 38.) When the collector paid over to and settled with the treasurer, he was entitled to retain from the amount so charged, the five per cent for his fees. Under that system, when the treasurer issued his warrant to the sheriff, against a collector, it was issued for the whole amount, including the fees of the collector, which the sheriff collected; the statute, as we have seen, giving him the same per centage which it gave the collector, which he was authorized to deduct and retain. Thus the county lost nothing, if the sheriff succeeded in collecting the amount of the tax from the collector. This system was in part changed in 1845, by the legislature. (*Sess. Laws of* 1845, *ch.* 180, *pp.* 189, 190.) Under this act the collector's fees could not be added to the tax list and warrant. The fees of the collector were reduced to one per cent on all sums voluntarily paid by persons taxed, within thirty days after the collector had received his roll and warrant and given the notice required by the act, and he was allowed five per cent on the residue collected by him after the thirty days. This per centage the collector was authorized to add himself, and collect with the tax in the list. The treasurer of course could only charge the collector with the amount contained in the tax list and warrant; and when the collector paid over the money collected, to the treasurer, and settled his account, he was entitled to retain nothing from the

amount. And when it became necessary for the treasurer to issue his warrant, against a collector, he could only issue it for the precise amount the collector was required to pay into the treasury.

As the statute does not authorize the sheriff to collect any fees, from the collector, he can only collect the amount specified in the warrant. The consequence is, that either the sheriff can get no fees for the service, or the county is deprived of so much of the tax as will satisfy his claim for fees. The section requiring the sheriff to execute these warrants, and prescribing his compensation, still remains as it was originally enacted, and the question arises, whether the fees of the sheriff have been taken away by this subsequent legislation, so that he is now obliged to perform the service without compensation. By a strict and literal reading and interpretation of the statute as it now stands, such would undoubtedly be the result. The standard by which the sheriff's compensation is in terms granted, has been destroyed. The provision respecting compensation is a mere delusion, if not a snare. But after a careful consideration of the subject, I am clearly of the opinion that the sheriff is still entitled to his fees, the same as he was before the act of 1845. It was manifestly not within the intention of the framers of that statute, to deprive the sheriff of his fees, in cases like this. If they are taken away, it is by implication only, as neither the subject of the duty, nor the compensation, is mentioned, and neither, obviously, was intended to be embraced or affected.

A public officer is not to be deprived of the compensation prescribed by a statute, for services which he is required to perform, by implication; unless such implication is entirely clear and necessary. It is a well established rule of interpretation, that when it is not manifestly the intention of the legislature that a subsequent act shall control the provisions of a former act, the subsequent act shall not be construed as having such an operation, even though the words, taken strictly and grammatically, would repeal the former act

(*Smith's Com.* 879, § 757.) By the former act the sheriff was entitled to five per cent, although that per centage was not fixed in terms; it was, nevertheless, rendered as definite and certain, by the provisions of the section, as though such per centage had been specified in terms. That was what was intended to be given. Had that per centage been named, in the section referred to, as the sheriff's compensation, there could be no pretense that the subsequent act had affected it. Construing both acts, as we are bound to do, by the clear and manifest intention of the legislature, it is entirely certain that the defendant has retained no greater amount for his compensation than the law allows. He must have this or nothing.

The loss to the treasury arises from the default of the collectors, and may be charged upon their respective towns. The defendant is therefore entitled to judgment.

[Monroe General Term, December 7, 1857. *Johnson, T. R. Strong* and *Welles*, Justices.]

Luther Graves *vs.* Mary M. Mumford, Abraham Varick, Salmon Gorsline and Henry S. Potter.

In February, 1847, G. applied to W. for a loan of $3000 upon a bond and mortgage on his farm. W., as the agent of V. who had sent money to him for investment, agreed to make the loan. There was, at the time, a mortgage upon the farm, given by P., a former owner, to H. S. P., for $2200. G. then gave his bond and mortgage to V. to secure the payment of the sum of $3000, which he received from W. less the amount of H. S. P.'s mortgage, which sum W. retained in his hands to pay the latter mortgage. The money secured by the mortgage from P. to H. S. P. was not then due, and H. S. P. refused to receive the same before it was due. W. paid H. S. P. the interest on his mortgage, from time to time, until the 2d of July, 1849, when he paid him the balance of principal and interest, with money belonging to M., in his hands to be invested for her. H. S. P. then, at the request of W., executed an assignment of the mortgage in blank, W. saying he wanted the mortgage, to raise the money again temporarily, and did not know from whom he should get the money. He afterwards filled up the blank with

the name of M. as the assignee. W. died in 1851, without having applied the money of V., retained by him for that purpose out of the loan made to G., to the payment of the P. mortgage. He had, from time to time, remitted to V. the interest on the whole amount of G.'s mortgage. V. had no actual notice or knowledge of the existence of the P. mortgage, or of the facts relative to its alleged payment by W. An indorsement was made upon the bond of P., by W., stating that the bond was not to be enforced against P., but resort was only to be had to the mortgage. In November, 1850, G. and wife conveyed to the plaintiff a portion of the mortgaged premises. In March, 1852, M. having commenced a foreclosure of the P. mortgage so assigned to her, by advertisement under the statute, the plaintiff brought this action, to restrain a sale of the premises under the advertisement.

Held 1. That M. had a right to purchase the P. mortgage from H. S. P., and to take an assignment thereof for her own benefit, as an investment of her money, or otherwise, and to employ W. as her agent for that purpose; and this although it was the duty of W., which he owed to V. and G. to pay off and discharge that mortgage, instead of keeping it on foot and causing it to be assigned.

2. That M. was not chargeable with notice of the transactions between W., V. and G., for the reason that those transactions were not connected with the subject matter of W.'s agency for her.

3. That the legal effect of the transactions between W. and H. S. P. was not a payment and satisfaction of the P. mortgage. That W. was then acting as the agent of M., and paid the money out of her funds, which he had no right to use for any other purpose than an investment for her; and that the object of his agency in her behalf would be defeated by regarding the payment in the light of a satisfaction of the mortgage.

4. That the indorsement made by W. upon the bond of P. was no evidence of the payment of either the bond or mortgage, but was, at most, only a release of the personal liability of P.

5. That the assignment of the P. mortgage to M. was valid and effectual, and the mortgage was a lien upon the premises for the full amount secured thereby, deducting the payments made thereon.

6. That the plaintiff, as the owner of a portion of the mortgaged premises, was entitled to be relieved as against the mortgage given by G. to V., to the amount due on the P. mortgage. That the agreement of W. to pay off the P. mortgage, and the retention of the money of V. by him for that purpose, bound V. to see that mortgage discharged before the mortgage given by G. should become valid for the full amount of $3000. And that this agreement being a part of the contract of loan, V. was bound to fulfill it, and must be held responsible, as between him and G. and the plaintiff, for the fidelity of his agent.

Graves v. Mumford.

THIS action was brought to have a bond and mortgage, which is held by the defendant Mary M. Mumford, and which is a lien upon the plaintiff's farm, delivered up and canceled. The case was this: On or about the 1st of February, 1847, the defendant Salmon Gorsline applied to Frederick Whittlesey, then of the city of Rochester, since deceased, for a loan of $3000, to be secured by his bond and a mortgage upon the farm in question, then owned by said Gorsline, situated in the town of Irondequoit, in the county of Monroe, and particularly described in the complaint. Whittlesey, as the agent of the defendant Abraham Varick, and having in his hands as such agent the money of said Varick for investment, agreed to make the loan. When the application was made for this loan, there was a mortgage upon the farm in question, duly recorded, given by one James Parsons to the defendant Henry S. Potter, dated January 10th, 1844, upon which there was unpaid about $2200, the said Parsons being at the date of said mortgage the owner of the farm; and he afterwards conveyed the same to the defendant Gorsline. Gorsline thereupon executed his bond, dated February 1st, 1847, conditioned to pay $3000 to the defendant Varick, secured by a mortgage executed by himself and wife to Varick, upon said farm. The bond and mortgage were then delivered by Gorsline to Whittlesey for Varick, and Whittlesey paid to Gorsline the $3000, less the amount of Potter's mortgage which he retained in his hands to pay the latter mortgage, that being a part of the agreement for the loan; at this time the money secured by the mortgage from Parsons to Potter was not due, and Potter refused to receive the principal until it was due. Whittlesey paid Potter the interest on his mortgage from time to time, until the 2d July, 1849, when he paid him the balance of the principal and interest, with money belonging to the defendant Mumford, in his hands to be invested for her. This payment was made in the manner and under the circumstances following: Potter and Whittlesey met at the office of the latter in the city of Rochester, on

the 2d day of July, 1849. The amount due Potter on the mortgage for principal and interest was ascertained to be $2287.39, for which Whittlesey gave Potter his check on the Commercial Bank of Rochester, where the money of the defendant Mumford was deposited in Whittlesey's name. Whittlesey then drew up an assignment of the mortgage, to be executed by Potter, with a blank for the name of the assignee, and requested Potter to execute it, to which Potter objected. Whittlesey then said to Potter, "I have paid the money, have I not? nobody else has paid it." Potter then said "yes." Whittlesey then said he wanted the mortgage, to raise the money again temporarily; said either that he had used or spent the money, and that he wanted to raise the money temporarily, and he wanted the assignment in blank, because he did not know from whom he should get the money. Potter then executed the assignment, with the blank left for the name of the assignee, and delivered the same with the bond and mortgage to Whittlesey, who afterwards filled up the blank with the name of the defendant Mumford. The bond and mortgage were produced on the trial at the special term, by the counsel for the defendant Mumford, together with the assignment; which assignment bore date July 2d, 1849, and was in the usual form, signed by Potter and witnessed by Whittlesey, with the name of the defendant Mumford, as assignee. It was a printed blank, filled up in the handwriting of Whittlesey, and its execution by Potter was proved on the 6th of July, 1849, by Whittlesey as subscribing witness, before a commissioner of deeds. Whittlesey died in 1851, without having applied the money of Varick, retained by him for that purpose out of Gorsline's loan, to the payment of the mortgage of Parsons to Potter, and without having paid said mortgage in any way, except as above stated. He remitted the interest on the whole amount of Gorsline's mortgage, from time to time, as the same fell due to Varick, who was a capitalist residing in the city of New York, and had no actual or personal notice or knowledge of the existence of the Par-

sons mortgage, or of the foregoing transactions in relation to its alleged payment by Whittlesey, who had sent him the Gorsline bond and mortgage for the $3000, as an absolute unconditional investment for that amount. The bond of James Parsons to Potter, when produced at the trial as aforesaid, had upon it, in the handwriting of Whittlesey, the following indorsement: "This bond is not to be enforced against James Parsons personally, but resort is only to be had to the mortgage. July 2d, 1849. F. Whittlesey." Thomas Parsons, a witness for the plaintiff, testified that in 1849 he was the general agent of James Parsons, and had charge of his business. That he saw H. S. Potter on the day when he, Potter, had received the money from Whittlesey, and had a conversation with him. That he was present when the above endorsement on the bond was made, of July 2d, 1849. That he told Whittlesey that Potter had told him the mortgage was paid. That Whittlesey replied that the mortgage was paid, but he wanted to hold it to protect the Varick mortgage. He said the only incumbrance on the farm was the Varick mortgage. That he would cancel the bond, if that would be satisfactory to witness. Witness told him he wanted both the bond and mortgage, but if he would satisfy the bond, it would probably answer. That Whittlesey then made the indorsement on the bond. This evidence of the conversation between the witness and Whittlesey was objected to in due time by the counsel for the defendant Mumford. The objection was overruled, and an exception taken.

It appeared that the defendant Potter conveyed the farm in question to the said James Parsons, by deed dated January 10, 1844. Parsons, at the same time, executed a mortgage thereon to said Potter, to secure the sum of $2221.74, being part of the purchase money, which was the same mortgage above mentioned. That on the 20th day of February, 1845, Parsons and wife conveyed the same premises to the defendant Gorsline, subject to said mortgage, which Gorsline assumed to pay. That Gorsline continued to own and occupy the

said premises until November 12th, 1850, when he and his wife conveyed to the plaintiff, by deed with covenants of warranty, a portion of said farm, being 152 acres thereof, the whole farm containing 254 acres. In March, 1852, the defendant Mumford commenced a foreclosure of the mortgage of Parsons to Potter, assigned to her as before stated, by advertisement under the statute; whereupon the plaintiff commenced this action, and obtained an injunction against the sale in pursuance of the advertisement. The complaint contained a demand of judgment that the defendant Mumford deliver up the Parsons mortgage to be canceled. That the assignment of the said mortgage to her be adjudged fraudulent and void, and that Potter be directed to satisfy the same of record; or that the mortgage of $3000, made by Gorsline to Varick, be adjudged a lien on said farm and a valid security only to the amount which was actually paid to him by Varick at the time of its execution and delivery to Whittlesey, or for such other or further relief as might be equitable and just, &c. There were various other matters given in evidence, not necessary to be here stated.

The action was tried at the special term held in the county of Monroe, in January, 1856, before Mr. Justice SMITH, and a judgment rendered, in substance, that the mortgage executed by Parsons and wife to Potter was paid and satisfied in full, and that the defendant Mumford be perpetually enjoined from foreclosing or instituting any proceedings to enforce the payment of the same. That the assignment of said mortgage from the defendant Potter to the defendant Mumford, dated 2d July, 1849, be declared fraudulent and void and be set aside, and the record thereof canceled. That the defendant Potter execute, on request, a discharge of the Parsons mortgage. It was also adjudged that at the time of making the loan by the defendant Varick to the defendant Gorsline, Whittlesey was, and subsequently continued to be, the agent of Varick, and was bound by the contract and arrangement of Whittlesey in respect to said loan and the payment of Pot-

ter's mortgage. That Whittlesey, as the agent of Varick, on the 2d day of July, 1849, paid the balance due upon said mortgage to Potter, and thereby entitled Varick and Gorsline and those claiming under them to have the same discharged of record; and that the bond and mortgage executed by the defendant Gorsline to the defendant Varick were valid securities for the whole sum expressed in the condition thereof, with the unpaid interest thereon, and that the defendant Varick was entitled to collect the same. The justice before whom the action was tried made a special report of his findings of the facts, which, so far as is necessary, are referred to in the following opinion of the court at general term. The defendant Mumford appealed from this judgment.

The appeal was argued by

S. Mathews, for the defendant Mumford.

H. S. Ives, for the defendant Varick.

John H. Martindale, for the plaintiff.

By the Court, WELLES, J. The justice, at the special term, found that the money with which Whittlesey paid Potter the amount due on the Parsons mortgage was the money of the defendant Mumford, and was in his, Whittlesey's, hands for the purpose of investment. This, I think, was warranted by the evidence. Assuming that Mrs. Mumford is chargeable with knowledge of all the facts in relation to the transactions between Whittlesey, Varick and Gorsline, it was nevertheless competent for her to make Whittlesey her agent to invest her money, either with specific instructions as to the nature of the investment to be made and the particular securities to be taken, or with general discretionary power in those respects. It was competent for her to purchase the Parsons mortgage from Potter, with her own money, and to take an assignment of it to hold for her own benefit, as an investment of her

money or otherwise; and this she could do through her agent Whittlesey, as well as personally, or through any other agent. In this respect, it makes no difference that it was the duty of Whittlesey, which he owed Varick and Gorsline, to pay off and discharge that mortgage, or that Mrs. Mumford is chargeable with knowledge of the transactions between them. It was not Whittlesey's duty to discharge the mortgage with *her money*, intrusted to him for another purpose and for her own use and benefit. But she is not so chargeable with notice, for the reason that those transactions were not connected with the subject matter of Whittlesey's agency for her. That agency had nothing to do with the obligations of Whittlesey to Varick and Gorsline, or either of them. Potter had a clear right to sell and assign the mortgage, and Mrs. Mumford an equally clear right to purchase it; and the facts, with notice of which it is claimed she is chargeable, transpired in his agency for other persons, with which facts and persons she was entirely disconnected. (*Story on Agency*, § 140. *Story's Eq. Jur.* § 408.) To hold her chargeable with knowledge of those facts and transactions, would be carrying the doctrine of constructive notice to an unwarrantable extent.

But it is contended that the legal effect of what took place between Whittlesey and Potter, was a payment and satisfaction of the Parsons mortgage. To this I cannot assent. It is quite probable, and I think the evidence warrants the conclusion, that Potter, at the time he received the payment, on the 2d July, 1849, supposed he was receiving it in satisfaction of the mortgage. But it does not follow that Whittlesey so intended. On the contrary, the fact that in the same interview, and before they had closed the business which brought them together, Whittlesey required an assignment of the mortgage from Potter, which the latter accordingly gave, is strong evidence to show that Whittlesey did not intend to satisfy the mortgage; and the fact that Potter then executed the assignment, shows that whatever had been *his* intention in receiving the money, or his impression as to the effect of it, he ultimately

consented to give an assignment. It was not then too late. The payment was made by Whittlesey's check on the Commercial Bank of Rochester, and Whittlesey, in case of Potter's refusal to assign the mortgage, might have countermanded its payment. No receipt, satisfaction, acquittance, or other evidence of the payment, had been given. Suppose Whittlesey had told Potter, at that interview, and before the money was handed over, that he wished to pay the mortgage, and had accordingly counted out the money, and Potter had taken it into his hands, and had actually put it into his pocket, and thereupon it had been immediately agreed between them that the mortgage should be assigned, and Potter had executed an assignment to Mrs. Mumford; the question whether such payment should operate as a satisfaction of the mortgage would depend upon whether it was the duty of Whittlesey, in the character in which he was then acting, to satisfy the mortgage or to take an assignment of it. If he was acting as the agent of Varick and Gorsline, or of either of them, and had paid their money to Potter, he would be now held as having paid the money in satisfaction of the mortgage; if, as the agent of Mrs. Mumford, and with her money, she would be entitled to insist upon the validity of the assignment. But he was clearly acting in the character of agent for Mrs. Mumford. It was her money which he was charged with the duty of investing, and which he had no right to use for any other purpose than an investment for her; and which would be entirely defeated by regarding the payment in the light of a satisfaction of the mortgage. It is no answer, as it seems to me, that Whittlesey had some time before been placed in funds by Varick, sufficient to pay over the whole $3000 loan to Gorsline; and that he was consequently bound, under his agreement with the latter, to pay off and satisfy the mortgage from Parsons to Potter. It by no means follows, that because he had converted Varick's money to his own use, Mrs. Mumford should suffer by his defalcation; or that she was not at liberty to employ him as her agent to invest this money for her; nor is it im-

portant, under the circumstances of this case, that when Potter assigned the mortgage, the name of the assignee was left in blank. It was understood between Potter and Whittlesey at the time, that the latter should be at liberty to fill the blank afterwards, and it was of no consequence to Potter whose name should be inserted. It was an authority to Whittlesey to fill the blank with the name of any person he might choose, and was a matter in which neither Varick nor Gorsline had really any interest; nor is the indorsement on the bond of Parsons, made by Whittlesey, to the effect that the bond was not to be enforced against Parsons personally, but that resort was to be had only to the mortgage, any evidence of payment or satisfaction of either the bond or mortgage. The most that can be claimed for it is a release of Parsons' personal liability. The conversation between Whittlesey and the witness Thomas Parsons, as testified to by the latter, was improperly admitted in evidence. It should have been excluded as *res inter alios actu.*

In my judgment, the evidence shows a valid assignment of the Parsons mortgage to the defendant Mumford, which she is entitled to hold and enforce.

I agree with the learned justice at the special term, that the plaintiff is entitled to be relieved as against the Gorsline mortgage to Varick, to the amount due on Parsons' mortgage to Potter. The justice properly remarks that, "as between the plaintiff and the defendant Varick, the agreement of Whittlesey to pay off the Potter mortgage, and the retention of the money by him for that purpose, must bind the defendant Varick to see that mortgage discharged before the mortgage of Gorsline to him should become valid for the full amount of $3000. That this agreement was part and parcel of the contract of loan, and Varick must be held for its fulfillment, and must he held responsible as between him and Gorsline and the plaintiff, his grantee, for the fidelity of his agent."

The judgment of the special term should be modified, so as to declare the mortgage of Parsons to Potter a good and valid

security and lien upon the land and premises therein described, in the hands of the defendant Mumford, as assignee thereof, for the amount which it was given to secure, with interest according to its terms, deducting all the payments made thereon at the dates of such payments respectively, without regarding the payment made by Whittlesey to Potter on the 2d day of July, 1849, as a payment thereon; and requiring Varick either to pay off and have discharged of record the last mentioned mortgage, or credit on his mortgage from Gorsline the amount so due on the mortgage from Parsons to Potter, at his election, and to determine such election within thirty days after due service of an order of confirmation of the report of the referee hereinafter mentioned; and that it be referred to a referee, to ascertain and report the amount so as aforesaid due on the last mentioned mortgage up to the date of his report; and in case Varick shall neither make such payment or indorsement, then declaring the mortgage from Gorsline to him to be valid for such sum only as shall remain after deducting from the nominal amount thereof, the amount so due on the Parsons mortgage; and that the defendant Varick pay to the plaintiff and the defendant Mumford, or their attorneys respectively, their costs in the action, including the costs of this appeal.

[Monroe General Term, December 7, 1857. *Johnson*, *Welles* and *Smith*, Justices.]

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David Dumond *vs.* S. L. Stringham.

By a will executed previous to the adoption of the revised statutes, the testator devised certain premises to his son, in these words: "I give and bequeath to my son H. D. one hundred acres of land, off the west end of my land on lot No. 22 in the town of F.. to include the improvements made by my sons D. and W. D." He also gave to H. D. the use of a certain meadow until J. should arrive at the age of 21 years, a legacy of $100, and all the testator's stock, of different kinds of cattle, which had not already been

disposed of. Another part of the will contained the following clauses: "I also allow my son H. D. to give to my son J. D. common English schooling, at the expense of him, H. D." "My will also is, that if any of my heirs above mentioned should die without lawful issue, that the part willed to them should be equally divided between the surviving heirs." *Held* that the language used in devising the land to H. D. gave to him an estate in the premises for his life only; but that the subsequent clause, by which the testator "allows" the devisee to give to J. D. common English schooling at his own expense, imposed a personal charge upon the devisee, in respect or on account of all the provisions made by the will in favor of H. D., including the land; the effect of which was to enlarge the estate from one for the life of the devisee, to that of a fee.

Held also, that by the clause directing that if any of his heirs should die without lawful issue, the part willed to them should be equally divided between the surviving heirs, H. D. took a *conditional fee*, depending upon his leaving lawful issue at the time of his death; in which case such issue would take, and if he should die without issue the condition would fail, and the limitation over to the surviving heirs of the testator would be effectual by way of an *executory devise*.

Held further, that the limitation over was not void because of the remoteness of the contingency; it being apparent, from the whole scope and tenor of the will, that the testator intended when one of his children should die without lawful issue, that his or her share should vest immediately in the survivors.

Lott v. *Wykoff*, (2 *Comst.* 355,) distinguished from the present case.

THIS was an action of ejectment, brought by the plaintiff to recover an undivided one sixth part of certain premises hereafter mentioned. The action was tried at the circuit court held in the county of Seneca, in March, 1856, before Mr. Justice T. R. STRONG, without a jury, a jury being waived by the parties. Upon the trial the following facts were agreed upon by the counsel for the respective parties, viz: That William Dumond, late of the town of Fayette, in the county of Seneca, and state of New York, was in his lifetime seised in fee simple of about one hundred and sixty-two and one half acres of land, being the south part of lot No. 22 in the township of Romulus, (now Fayette,) including the premises in question, of one hundred acres, lying on the west end thereof. That on the 1st day of March, in the year 1813, the said William Dumond duly made and published his

last will and testament, containing the following provisions: "I give and bequeath unto my beloved wife Rachel Dumond six hundred dollars, to be paid in manner following, viz: two hundred and fifty dollars as soon as the first payment is made for land sold to Henry Chunkquiter, and three hundred and fifty dollars in four equal payments, as the payments from the said Henry Chunkquiter become due and are paid. I also give and bequeath to my said widow, my bed and bedding on which myself and my wife usually lay; also her two choices of the milch cows in my flock; also six head of old sheep, which she may choose; also I leave to my beloved wife the youngest one horse, saddle and bridle; all which I give to my wife in lieu of her dower. Item: I give and bequeath unto my son David Dumond nine hundred dollars, to be paid in manner following, viz: four hundred dollars as soon as the first payment is made for the land on which I live, bought by Henry Chunkquiter, and the remaining five hundred dollars to be paid in equal installments, as the payments due on the above mentioned sale become due and are paid. Item: I also give and bequeath unto my son William V. Dumond seven hundred dollars; four hundred dollars to be paid as mentioned before for David Dumond, and the remaining three hundred dollars to be paid as the before mentioned legacies are. Item: I give and bequeath unto my son Herman Dumond one hundred acres of land, off the west end of my land on lot No. 22 in the town of Fayette, to include the improvements made by my sons David and William Dumond. I also leave to my said son Herman Dumond the use of the meadow on the east end of said lot, until my son Joseph comes to the age of twenty-one years; also I leave to my said son Herman one hundred dollars, to be paid in hand. I also give to my son Herman all my stock of different kinds of cattle, whatsoever, which have not already been disposed of. Item: I give and bequeath unto my son Joseph Dumond the remainder of my lands on the south side of said lot No. 22, to include the meadow at the east end of said lot. Item: I give and be-

queath unto my daughter Temperance Duells five hundred dollars, to be paid into the hand of my son Herman Dumond; one hundred and fifty dollars at the time the first payments are to be made to the other heirs, and the remaining three hundred and fifty dollars to be paid as the payments of the first above mentioned heirs receive their shares, which my said son Herman Dumond shall lay out in land to the best advantage he can, for her and her heirs. Item: I give and bequeath unto my daughter Caty five hundred dollars, to be paid and applied in the same manner and for the uses for my said daughter Caty, as mentioned in the above bequest. Item: I give and bequeath unto my daughter Elizabeth five hundred dollars, to be paid at the times before mentioned, for the benefit of her and her heirs, as described above, to the other female heirs. I also give to my said daughter Elizabeth one hundred dollars, out of the last payment to be made on the land sold to Henry Chunkquiter. I also give and bequeath unto my granddaughter Rachel Rosekrans one hundred dollars, of the last payment above mentioned. I also allow my son Herman Dumond to give to my son Joseph Dumond common English schooling, at the expense of him, my son Herman Dumond. I also allow all my farming utensils, loom, &c. to be sold at public vendue, and the money arising from said sale to be equally divided between my sons David, Herman, William and Joseph Dumond. I also allow all my grain in the sheaf, bushel, ground or otherwise; all my meats, potatoes and other vegetables, to be for the support of my widow and family. I also allow my widow to have the use of all my dresser, &c. kitchen furniture during her natural life, and at her death be equally divided between my three daughters mentioned in this will. My will also is, that if any of my heirs above mentioned should die without lawful issue, that the part willed to them should be equally divided between the surviving heirs. I also allow that if my son Herman should die during my wife's widowhood, that she should have the profits of the land willed to my son Herman,

during her widowhood, and no longer. I also order all my lawful debts and funeral expenses to be paid out of the several legacies, in proportion to the sums allowed to each heir. I also allow and order my executors to convey to Henry Chunkquiter the lands sold to him, as will appear in the article of sale: and I do hereby appoint Hugh McAllister and Alexander Rorison of Fayette town, and county of Seneca, my executors of this my last will and testament, hereby revoking all former wills by me made."

On the 5th day of March, 1813, the testator duly made a codicil to his said will, the contents of which are not necessary to be stated for the purpose of presenting the questions arising in the case. The will and codicil were duly executed and witnessed. By the will and codicil the testator disposed of all his property, real and personal. On the 13th of March, 1813, the testator departed this life, at Fayette aforesaid, leaving the said will and codicil unrevoked and in full force, which was duly proved and recorded in the surrogate's office in Seneca county, on the 23d March, 1813. The said William Dumond left him surviving the following named children and grandchildren and heirs at law, to wit: David Dumond, the plaintiff in this suit; Herman Dumond, who died on the 1st December, 1852, without issue and without ever having married; William V. Dumond, who died in the autumn of 1851, leaving children him surviving; Joseph Dumond, who died after his father's death, under age without issue, never having married, and was about ten years old at his father's death; Temperance Duells, wife of Samuel Duells, who died since the death of her father, leaving one child who is still living; her husband, Mr. Duells, died before the death of said Temperance; Elizabeth, who was married to Nelson Rosevilt, who died after the death of her father about thirty years ago, leaving her husband and two children, who are still living; Catherine, who is the wife of George Stuck, both of whom are living; and Rachel D. Rosekrans, a granddaughter of William Dumond, who was the daughter of Jane Dumond Rosekrans, (a

daughter of the said William Dumond,) who died before the death of her father, the said Rachel being still living. Rachel Dumond, the widow of the testator, died about 29 years ago. After the death of William Dumond, Herman entered into the possession of the premises in question, and continued in such possession until he conveyed the same to the defendant, as hereinafter mentioned. On the 10th day of January, 1839, the said Herman Dumond sold and conveyed to the defendant, his heirs and assigns, by a warranty deed, for the consideration of $6000 expressed therein, the premises in question; and the defendant thereupon entered into the possession and occupation thereof, and has ever since continued and still continues in such possession and occupation thereof, claiming them as owner in fee.

The justice before whom the action was tried ordered judgment in favor of the plaintiff, that he recover one undivided sixth part of the premises, in fee, with $25 for rents and profits, and judgment was entered accordingly, from which the defendant appealed.

The following opinion was delivered by the justice before whom the cause was tried:

T. R. Strong, J. "According to the law in force at the time of the death of William Dumond, in 1813, by which the construction and effect of the devise must be determined, it is clear that the words, 'I give and bequeath unto my son Herman Dumond 100 acres of land, off the west end of my land on lot No. 22, in the town of Fayette, to include the improvements made by my sons David and William Dumond,' unless there is something further in the will manifesting an intention to pass a larger estate, gave to the devisee an estate only for life. Some words of inheritance, or evincing an intention to give a fee, were, prior to the revised statutes of 1830, essential to create such an estate. (*Mesick* v. *New*, 3 *Selden*, 163. *Harvey* v. *Olmsted*, 1 *Comst.* 483.)

It is claimed on the part of the defendant, that the clause

in the will, 'I also allow my son Herman Dumond to give to my son Joseph Dumond common English schooling, at the expense of him, my son Herman Dumond,' imposed a charge upon the devisee in respect to the land devised, and thus enlarged the estate to a fee. The rule is well settled that a devisee, without express words of limitation or perpetuity, will pass a fee, if the devisee is personally charged with a debt or duty in respect to the subject of the devise; for the reason that if the devisee should take an estate for life only, he might be a loser by the termination of his estate before he could realize from it benefits equal to the charge, and hence it will be regarded that the devisor intended a fee; but I do not think the rule applicable to the present case. In addition to the devise of the 100 acres of land, the use of a meadow until Joseph Dumond should come to the age of 21 years, and considerable money and personal property were given to Herman. The clause as to the schooling is in a different part of the will from the devise and bequests to Herman; and assuming the clause to impose a charge, there is nothing in the language of the will indicating that the furnishing the schooling was intended to be made a charge in respect to the subject of the devise. (*Mesick* v. *New*, *above cited.* 2 *Preston on Estates*, 243, 4.)

Another clause in the will is also relied on in behalf of the defendant, as manifesting an intention to devise a fee to Herman. The will makes provision for several children of the testator besides Herman, and after the several devises and bequests, proceeds: 'My will also is, that if any of my heirs above mentioned should die without lawful issue, that the part willed to them should be equally divided between the surviving heirs.' It is insisted that this clause implies, that in case of issue they would take, and thus proves a design to give a fee. I think this a sound position. The case of *Jackson* v. *Billinger*, (18 *John.* 368,) is directly in point in support of it. In that case, there was a devise to a son of the testator, of a farm, without words of limitation or perpetu-

ity, with a clause that 'if my said son happen to die unmarried and without lawful issue,' then the estate to go to another person, it was adjudged that the son took an estate tail by implication, which was converted into a fee by the statute. (*See also* 4 *Kent's Com. 7th ed.* 441, *marginal paging, and cases there cited.*)

The next succeeding clause in the will, 'I also allow that if my son Herman should die during my wife's widowhood, that she should have the profits of the lands willed to my son Herman, during her widowhood, and no longer,' is not inconsistent with the intention to devise a fee to Herman; it merely gives an interest to the wife, to which the devise in fee was to be subject. It was manifestly the intention of the testator that the fee should not be an absolute fee simple; this is clear from the limitation of the estate to the surviving heirs, on the death of any of the heirs without lawful issue. Whether that intention can be effectuated, depends upon the construction to be given to the language of the limitation. If the words 'without lawful issue' be held to mean an indefinite failure of issue, the limitation is too remote and void: an estate tail was created, and Herman, by force of the statute abolishing estates tail, took a fee simple; but if they are held to mean without issue living at the decease of the heir dying, the fee devised was a determinable or qualified one, and not a fee tail, and the limitation is good as an executory devise. The estate was then determinable upon the death of the devisee without issue, and upon the happening of that event the estate passed to the survivors. The word 'heirs,' in the limitation over, was obviously used in the sense of the term 'children,' as the only 'heirs above mentioned' in the will were the children and a grandchild of the testator; and the clause is to be read as if the words 'children and grandchild' were in the place of the word 'heirs.' The limitation was then in effect, if any of the children or the grandchild should die without lawful issue, the part willed to them should be equally divided between the surviving children and the grand-

child. In this view of the limitation, it is, I think, apparent that the words 'should die without lawful issue,' refer to the time of the death of the deceased child of the testator, and the words 'surviving heirs,' have reference to the same period; and hence the limitation is valid by way of executory devise. The case appears to be directly within the authority of *Anderson* v. *Jackson*, in the court of errors of this state. (16 *John.* 382.) In that case it was decided that a limitation after a devise to the sons of the testator A. and B., and their heirs, &c. that if either of the said sons should die without lawful issue, his share should go to the survivor, meant issue living at the death of the son, and was good as an executory devise. (4 *Kent's Com. 7th ed.* 278, *marg. paging, and cases there cited.*)

The case of *Lott* v. *Wykoff*, (2 *Comst.* 355,) is supposed by the counsel for the defendant, to be like the present in principle; but the difference between the two is very marked and obvious. The limitations over, in the former case, were to take effect upon the regular expiration of the primary estates, and were therefore remainders and not conditional limitations; in this case an estate in fee was devised, to be determined upon the contingency specified, and the limitation over is an executory devise.

It follows from the construction of the clause of limitation, above given, Herman having died without issue at his decease, that the plaintiff as one of the surviving heirs or children of William Dumond, named in his will, upon Herman's death, took a share of the premises in question, and consequently is entitled to recover in this action.

Judgment must therefore be given for the plaintiff, pursuant to the stipulation in the case, for one undivided sixth part of the premises in fee, with twenty-five dollars for the rents and profits thereof, and with costs."

The cause was argued on the appeal by

B. Davis Noxon, for the appellant.

S. Mathews, for the respondent.

By the Court, WELLES, J. The decision of this case must depend upon the proper construction to be given to the will of William Dumond, the father of the plaintiff. The will was executed, and took effect by the death of the testator, in the year 1813, and must be construed according to the law as it then existed, which was before the revised statutes were enacted. By this will the premises in question were devised by the testator to his son Herman, in the following words: "I give and bequeath to my son Herman Dumond one hundred acres of land, off the west end of my land on lot No. 22 in the town of Fayette, to include the improvements made by my sons David and William Dumond." This language gave the devisee an estate in the premises for his life only, unless other portions of the will manifest an intention in the testator to give a larger estate; or unless, from a view of all the provisions of the will, such intention can be discovered. It is contended, on behalf of the defendant, that the subsequent clause, by which the testator "allows" his son Herman to give to his, the testator's, son Joseph, common English schooling, at the expense of the said Herman, imposed a personal charge upon the devisee, Herman, in respect of the land devised, the effect of which was to enlarge the estate from one for the life of the devisee, to that of a fee. That the schooling of Joseph is charged personally upon Herman, I think cannot be doubted. The difficulty, if any, is in determining whether such charge was imposed *in respect of the land devised.* All the provisions contained in the will in favor of Herman, are grouped together under one item. They consist of, 1st. The devise of the premises in question; 2d. The use of a certain meadow, until Joseph should arrive at the age of twenty-one years; 3d. A legacy of $100, to be paid in hand; and 4th. The bequest of all the testator's stock of different

kinds of cattle, which had not already been disposed of. Why should the charge of Joseph's schooling, imposed upon Herman, be said to be in respect of one of these provisions in favor of the latter, rather than of another, or in respect of the $100 legacy, the use of the meadow and the bequest of the stock, or of one or more of them, rather than of the 100 acres of land devised, or of any or either, rather than of all? Will it do to speculate in regard to the extent of the burthen imposed, or the value of any or either of the provisions in favor of Herman?

It seems to me that the more rational construction is, to regard the charge to have been in respect, or on account, of all the provisions made by the testator in favor of the individual upon whom the charge was personally imposed, which would embrace the devise of the 100 acres of land; or, if any distinction is to be made between those different provisions, and any one of them regarded as that in respect to which the charge in question was imposed, the devise of the land should be selected, as being apparently the most substantial and adequate to secure the object, which was the schooling of Joseph, then about ten years old. (*Spraker* v. *Van Alstyne*, 18 *Wend.* 200.) If this be the correct view, it follows that the effect of the charge was to enlarge the life estate of Herman in the premises, which the language of the devise, taken by itself, would import, to that of an estate in fee. (*Mesick* v. *New*, 3 *Selden*, 163, *and authorities there cited. Spraker* v. *Van Alstyne, supra.*)

There is another provision in the will which not only shows, by implication, that the testator intended to give to Herman a fee in the premises in question, but defines the kind of fee which he intended to give. After making provision for several of his children, by name, including that for Herman, and after the several devises and bequests, the will proceeds as follows: "My will also is, that if any of my heirs, above mentioned, should die without lawful issue, that the part willed to them should be equally divided between the surviv-

ing heirs." By force of this clause, Herman took a *conditional fee*, depending upon his leaving lawful issue at the time of his death; in which case such issue would take, and if he should die without issue the condition would fail, and the limitation over to the surviving heirs of the testator would be effectual by way of an *executory devise*.

It is contended, however, on the part of the defendant, that the limitation is void because of the remoteness of the contingency. That the words in the clause of the will last cited—"should die without lawful issue"—mean an indefinite failure of issue. It is not denied that where an executory devise was limited to take effect after the *dying without heirs*, or *without issue*, or *without lawful issue*, or *on failure of issue* of the first taker, such and similar words, at the time this will took effect, imported an indefinite failure of issue; and the limitation was therefore void, as it might postpone the vesting of the estate in the executory devisee to a remote period, and longer than the law permitted. The courts of England had, for a period of centuries, held that where a testator employed such language in a limitation, he *intended* by them an indefinite failure of issue, unless a different intention could be discovered in the context, or other parts of the will, or from the whole will taken together; and the courts of this state, finding the rule of interpretation too inveterate to be corrected, short of a legislative enactment, felt constrained to follow it, until the absurdity was swept away by our revised statutes. The rule is, nevertheless, still in force in reference to wills which took effect previous to its abolition.

But whatever were the merits or demerits of the rule, it was one of interpretation of the intention of the testator in the use of the words "dying without lawful issue," or the like, and was always made to yield to other words in the will indicating an intention that the estate limited over should vest upon failure of issue of the first taker, living at his death.

In looking for the intention, in this respect, of the testator

in the present case, as the same is to be gathered from all his language on the subject, we cannot fail to discover that intention to have been, that in case of the death of either of his own children, or the grandchild mentioned in the will, without lawful issue living at the time of such death, the property, both real and personal, given to the one so dying, should go immediately to the surviving heirs of the testator. It will be perceived that previous to the clause in the will directing the disposition of the property given, in case of the death of any of his heirs without issue, the testator had made provision for each of his children living, and his grandchild, whose mother, the testator's daughter, was dead, by name, calling them his sons and daughters and grandchild, respectively; that the case shows that he disposed of all his property, real and personal, by the will and codicil; that in the clause under consideration he is speaking of any of his *heirs above mentioned* dying without lawful issue, and directing what shall be, in such event, the disposition of "*the part*" of his estate "*willed to them*," respectively. It is therefore clear, that by the use of the words "my heirs above mentioned," he intended his children and grandchild, for whom he had previously made provision in the will; and that by the concluding words of the clause—"*should be equally divided between the surviving heirs*"—he intended the survivors of the same children and grandchild; and I think it equally clear that by the words "lawful issue," he intended children or issue of the one dying, living at the time of such death. It cannot be supposed that he used the words in the strict technical sense contended for, as that might defeat his intention to give the share to the survivors by postponing the time when it should vest, to an indefinite period. It is, on the contrary, quite apparent, from the whole scope and tenor of the will, that he intended, when one of his said children or the grandchild should die without lawful issue, that his or her share should vest immediately in the survivors. Upon this question I concur entirely in the views expressed by the just-

ice who decided the cause at the circuit, as I also do in most of the views of the case expressed by him on that occasion. (*Fosdick* v. *Cornell*, 1 *John.* 440. *Jackson ex dem. Burhans* v. *Blanchan*, 3 *id.* 292. *Ex'rs of Moffat* v. *Strong*, 10 *id.* 12. *Jackson ex dem. Staats* v. *Staats*, 11 *id.* 337. *Anderson* v. *Jackson ex dem. Eden*, 16 *id.* 382. *Jackson ex dem. Herkimer* v. *Billinger*, 18 *id.* 368. *Patterson* v. *Ellis' Ex'rs*, 11 *Wend.* 259. *Cutter* v. *Doughty*, 23 *id.* 513. *Sherman* v. *Sherman*, 3 *Barb.* 385.)

It is contended, with great confidence, by the defendant's counsel, that this case is within the principle of *Lott* v. *Wykoff*, (2 *Comst.* 355.) But it seems to us the cases are clearly distinguishable. The latter case has no application to the present, for the reason that in this, the first devisee, Herman, took a conditional fee, upon which a valid executory devise could be limited, and in that, the primary estates devised were given in tail, which, by the statute abolishing estates tail, were converted into estates in fee simple in the tenants in tail, the instant the will took effect.

If the will in the present case had given Herman Dumond an estate tail in the premises in question, the case of *Lott* v. *Wykoff* would have been in point, and conclusive in favor of the defendant. But it has been shown that Herman took a conditional fee, and that the devise over to the testator's children and grandchild upon failure of the condition, was valid and operative as an executory devise.

It follows that the plaintiff, under the facts established at the trial, is entitled to one undivided sixth part of the one hundred acres in question, and that the judgment at the circuit should be affirmed.

[Monroe General Term, December 7, 1857. *Johnson*, *Welles* and *Smith*, Justices.]

26 118
50 579
58 146
65 20
96 442
17a 486
67a 114

THE PEOPLE, *ex. rel.* Micah Baldwin, *vs.* THE BOARD OF SUPERVISORS OF LIVINGSTON COUNTY.

Where the relator as marshal, appointed under the acts of March 12, and April 6, 1855, to take the census of Livingston county, presented to the board of supervisors his account against the county for fifty-nine days' services as such marshal at $2 per day, and the board audited and allowed the same for forty days' services at $2 per day; *Held* that it was the duty of the supervisors to examine and decide as to the number of days the marshal was actually and necessarily employed; that in such examination and decision they acted judicially, and if they committed an error it formed no ground for a writ of mandamus.

DEMURRER to the return to an alternative mandamus. The alternative mandamus recited that the relator was appointed by the secretary of state to take the census for the town of Lima, in the county of Livingston, pursuant to the provisions of the act entitled "An act in relation to the census or enumeration of the inhabitants of this state," passed March 12, 1855. That the relator thereupon entered upon and discharged the duties of such office until the same was completed, as required by the act. That "*the said Micah Baldwin was actually and necessarily employed in the discharge of the duties of said office, and in taking the census and enumeration of the inhabitants of said town of Lima, as required by said act, fifty-nine days.*" That the relator presented his account for such services to the defendants, duly made out and verified as required by law, at a regular session of the defendants, for allowance, &c., and that the defendants refused to audit or allow the said account. The writ then commanded the defendants to audit and allow the said account for fifty-nine days' services as such marshal, at two dollars per day, &c., or show why, &c.

The defendants made a return to the writ, in the words following:

"The board of supervisors of the county of Livingston respectfully certify to the justices of the supreme court: That at the annual meeting of said board, held pursuant to law, in the month of November last past, (1855,) the said relator

Micah Baldwin, presented to said board his account for fifty-nine days' services which he claimed to have rendered as marshal in the town of Lima, in said county, under and by virtue of the act within mentioned. That said board, pursuant to the statute in such case made and provided, proceeded to examine, settle, audit and allow said account, and did examine, settle, audit and allow the same. That upon such examination and settlement, the said board ascertained and believed, found and determined, that said relator, Micah Baldwin, was not actually and necessarily employed as such marshal, under and by virtue of said act, fifty-nine days; and in like manner ascertained and believed, found and determined, that said relator was not so employed over forty days; and thereupon said board of supervisors audited and allowed said account of said relator for the sum of eighty dollars, pursuant to the statute and their duties in that behalf; and the said board of supervisors say that they have not refused to audit and allow the account of said relator, Micah Baldwin, for the services rendered by him as such marshal, as aforesaid."

The relator demurred to this return for insufficiency, and the defendants joined in demurrer.

James Wood, jun., for the relator.

Scott Lord, for the defendants.

By the Court, WELLES, J. The 13th section of the act of March 12th, 1855, in relation to the state census, (*ch.* 64, *p.* 90, *of Sess. Laws of* 1855,) provides that "the accounts for the services of the marshals and county clerks, done under this act, shall be audited by the supervisors of the county where the services are performed, except in the city and county of New York, where it shall be done by the common council; and shall be assessed, collected and paid as part of the contingent expenses of such city or county;" and by the 3d section of the act of the same session, passed April 7th, (*ch.* 181,

p. 259,) amending the first mentioned act, each "marshal shall receive for his services rendered under and by virtue of the act hereby amended, the sum of two dollars and no more, for each day he is actually and necessarily employed, to be audited and allowed by the board of supervisors in the county where he shall reside." Neither of the above acts provides any mode by which the boards of supervisors shall determine the number of days any marshal has been actually and necessarily employed in performing the services, under the act. It is not contended, and cannot be successfully, that the claim of the marshal must be audited and allowed by the supervisors for any number of days which the former may claim, although verified by his oath.

The revised statutes provide, that the board of supervisors of each county in this state shall have power at their annual meetings, &c., among other things, "to examine, settle and allow all accounts chargeable against such county, &c. (1 *R. S.* 366, 367, § 2; *subd.* 2, *4th ed.* 1*st vol.* 675, 676.) The account of the relator in this case was chargeable against the county of Livingston; and it was the duty of the supervisors to examine, settle, and allow it. The acts under which the services were rendered, fixed the *per diem* allowance therefor, and entitle him to be paid at that rate, for each day he was actually and necessarily employed. It follows, necessarily, that the supervisors must examine and decide as to the number of days, and when that is determined, the rest of their duty is ministerial; and if they omit to discharge it, a mandamus will lie to compel them.

But in the examination and decision of the question of the number of days the marshal was actually and necessarily employed, the board of supervisors act judicially; and if they commit an error in their decision, it forms no ground for the writ of mandamus. This is a principle too well settled to require the citation of any authority to prove it.

It is claimed by the relator that the return is defective, in not answering the statement in the writ that the relator was

actually and necessarily employed fifty-nine days. The return states that the relator presented his account for fifty-nine days, and that the defendants thereupon examined, settled and allowed the said account. That upon such examination and settlement, they ascertained and believed, found and determined, that the relator was not actually and necessarily employed as such marshal fifty-nine days, and in like manner ascertained and believed, found and determined, that he was not so employed over forty days, and thereupon the supervisors audited and allowed said account for the sum of eighty dollars; and they deny that they have refused to audit and allow the relator's account for services rendered by him as such marshal.

If, in determining the number of days the relator was employed as such marshal under the aforesaid acts, the board of supervisors acted judicially, the number of days the relator was in fact so employed was, in respect to this proceeding by mandamus, wholly immaterial. The return shows that the defendants had judicially determined that question, and such determination must, in this proceeding, be regarded as final.

It is sufficient to say in conclusion, that we concur fully in the views of Mr. Justice Smith, expressed when these parties were before him upon this same question, as reported in 12 *How. Pr. R.* 204.

Judgment should therefore be given for the defendants on the demurrer.

[Monroe General Term, December 7, 1857. *Johnson*, *Welles* and *Smith*, Justices.]

26 122
37 494
4h 170
36a 371

STRONG *vs.* GRANNIS and BROWN.
THE SAME *vs.* THE SAME.

Where, in an action against two persons as makers of a promissory note, the defense set up is that the note was executed under duress of imprisonment of one of the makers, and to procure his release therefrom, and was signed by the other as his surety, the principal is not a competent witness for the surety, to prove the defense; the defendants being jointly interested in the matters offered to be proved.

Where an arrest is rendered regular and lawful, in form, by the perjury of the plaintiff, he should not be permitted to derive any benefit from it.

Where a creditor residing in Canada, for the purpose of procuring the arrest of his debtor, a resident of this state, while temporarily in the former country, made an affidavit in which he swore that such debtor was about to leave Canada, with the intent and design to defraud him of his debt; such creditor in fact having no reason to believe the fact stated in such affidavit; and in order to procure his release from the arrest thus procured, the debtor executed a note for the amount of the debt, with a surety; *Held* that the note was void as having been obtained by duress.

Where there is an arrest for improper purposes, without a just cause; or, where there is an arrest fer a just cause, but without lawful authority; or, where there is an arrest for a just cause and under lawful authority, for unlawful purposes, it may be construed a duress.

APPEALS from judgments on reports of a referee. Both appeals were heard together. The actions were brought to recover the amounts of two promissory notes, both dated Niagara, C. W., January 17th, 1855, made by the defendants, each for the sum of $250, with interest, both payable at the office of Wm. Breck & Co., Rochester, N. Y., one in three months and the other in six months from date. Both notes were payable to the order of the defendant Samuel Brown. The defense interposed in each case was that the notes were executed under duress of imprisonment of the defendant Grannis and to procure his enlargement therefrom, and were executed by the defendant Brown as surety of the defendant Grannis.

The actions were both referred to a sole referee, and both came on for trial together before the referee, in November, 1856, when the following evidence was given and proceedings

had. The plaintiff proved the execution of the notes by the defendants, the indorsement of them by the defendant Brown, and the amount due thereon respectively, and rested. The defendant Thomas Grannis, jun. was then sworn as a witness. The defendants' counsel offered to examine him in behalf of his co-defendant Brown on the subject of the duress set up in the answers. The plaintiff's counsel objected to such examination, on the ground that Grannis was jointly interested with Brown on that subject. The referee sustained the objection, and the counsel for Brown excepted. The defendant Brown was then sworn and examined as a witness for his co-defendant Grannis, without objection, and testified in substance as follows: That the notes in question were signed by him for the accommodation of Grannis and as surety for him. That they were made at Niagara, Canada. That he, the witness, and Grannis resided at Rochester. That they, the witness and Grannis, were on their way to Toronto, for the purpose of doing some business there; that when they arrived at Niagara, they waited on the dock to take the boat for Toronto when she should start. That just before the boat was going to start, the sheriff came up and arrested Grannis upon a bailable capias, at the suit of George B. Redfield, in an action upon promises, commenced in the court of queen's bench in Canada. Immediately after the arrest of Grannis, he with the sheriff and witness went up to the office of Redfield, who told Grannis he was very glad to see him. That he had been waiting quite a little while to see him in Canada. Grannis asked him what he wanted of him. Redfield told him he had a demand against him of $500. Grannis told him he had no means of paying it there; that he had money at home. Redfield said he had got to pay or secure it, or go to jail. Grannis said he had no way of securing unless Brown was good. Then Redfield asked the witness what property he had, and the witness told him; whereupon the notes in question were made and executed by the defendants and indorsed by the defendant Brown, and Grannis was discharged from the arrest.

It appeared that Redfield had a good cause of action against Grannis and one Swan, for money paid for them as indorser of a note, to the amount of $500 and upwards. It also appeared by the evidence of Brown, that Grannis had a place of business in Toronto and Hamilton, in Canada, for selling oysters, and was over there frequently.

The arrest of Grannis was made by virtue of a statute of Upper Canada, which was given in evidence, and was in words and figures following:

"8th Victoria, cap. 48, § 44. And be it enacted, that from and after the passage of this act, no person shall be arrested or held to bail to any civil suit where the cause of action shall not amount to £10, lawful money of the province. And where the cause of action shall amount to £10 and upwards, it shall not be lawful for the plaintiff to proceed to arrest the body of the defendant or defendants, unless an affidavit be first made by such plaintiff, his servant or agent, of such cause of action, and the amount justly and truly due to said plaintiff from said defendant; and also that said plaintiff, his servant or agent, hath good reason to believe, and doth verily believe, that the defendant is immediately about to leave Upper Canada, with intent and design to defraud the plaintiff of his said debt."

The affidavit made by Redfield, upon which to procure said arrest under the above statute, was in the words and figures following:

"In the Queen's Bench. County of Lincoln, one of the united counties of Lincoln and Welland, to wit: George Brooks Redfield, of the town of Niagara, esquire, maketh oath and saith that Thomas Grannis the younger is justly and truly indebted to this deponent in the principal sum of one hundred and thirty-seven pounds and ten shillings, of lawful money of Canada, for money paid by this deponent for the said Thomas Grannis the younger, at his request; and this deponent further saith, that he hath good reason to believe, and doth verily believe, that the said Thomas Grannis the younger

is immediately about to leave Upper Canada, with the intent and design to defraud this deponent of the said debt.

GEORGE BROOKS REDFIELD.

Sworn before me at Niagara, in the county of Lincoln, this 17th day of January, 1855.

JOHN M. LOWDER, a Com'r for taking affidavits in the queen's bench in said county."

There was other evidence given which it is unnecessary here to state. The referee reported in favor of the plaintiff in each case for the amount of the respective notes and interest, upon which judgments were duly entered. The reports stated the foregoing facts, and also that the affidavit made by Redfield was in full compliance with the statute of Canada, but that as matter of fact he had no reason to believe that Grannis was about to depart with the intent stated in the affidavit.

The defendants appealed from these judgments. The cases are precisely alike, except that the first action was brought upon the note falling due in three months, and the second upon the one falling due in six months from their date.

S. Mathews, for the appellants.

W. F. Coggswell, for the respondent.

By the Court, WELLES, J. The first question to be determined, is whether the referee properly excluded the evidence offered by the witness Grannis, one of the defendants. And it seems to me that the evidence was properly excluded, within the principle of the case of *Dean* v. *Thornton and Dutton*, (3 *Kern.* 266.) That was an action brought for entering the plaintiff's close and cutting down and carrying away timber. The cutting and carrying away the timber, by the defendant, was proved. Dutton was sworn as a witness for Thornton, who offered to prove by him the sale of the timber in question to him, Thornton. The plaintiff's counsel objected to his competency to prove this fact, and the referee before

whom the cause was tried, sustained the objection. The defendant Thornton offered Dutton to prove the same fact, and the same objection and ruling were had. The referee found in favor of the plaintiff, against both defendants, upon which judgment was rendered, which was affirmed by the supreme court. On appeal to the court of appeals, the judgment of the supreme court was affirmed. I am unable to distinguish that case, in respect to the present question, from this one. In the matter offered to be proved in both cases, the defendants were jointly interested, because the proof which would exonerate one, would necessarily discharge the other, provided it were received on behalf of both.

The next question is, whether the facts proved on the trial, and found by the referee, established that the notes upon which the actions were brought, were obtained by Redfield, by duress, so as to avoid the notes in his hands. My opinion is that they were so obtained.

The referee reports that Redfield had no reason to believe that Grannis was about to depart with the intent stated in the affidavit. He might have added, with entire propriety, that Redfield did not so believe; as upon the evidence there was no pretense for such an allegation, and he could not have entertained such belief without stultifying himself, which the law will not permit him to do.

Although the arrest was according to the forms of the law of the country where it was made, and for a debt justly due from Grannis and Swan to Redfield, these circumstances did not justify Redfield in procuring the arrest. The arrest was made regular and lawful in form by the perjury of Redfield, and he should not be permitted to derive any benefit from it. The rule is, that where there is an arrest for improper purposes, without a just cause: or, where there is an arrest for a just cause, but without lawful authority; or, where there is an arrest for a just cause and under lawful authority, for unlawful purposes, it may be construed a duress.

(*Richardson* v. *Duncan*, 3 *New Hamp. R.* 508. *Watkins* v. *Baird*, 6 *Mass. R.* 506.)

The defendant Brown, being surety on the note, may avail himself of the duress of his principal. (*Thompson* v. *Lockwood*, 15 *John.* 256.) The judgments should therefore be reversed and new trials ordered, with costs to abide the event.

Ordered accordingly.

[MONROE GENERAL TERM, December 7, 1857. *Johnson, T. R. Strong* and *Welles*, Justices.]

ERWIN *vs.* VOORHEES.

Fraud is a question of fact for a jury, where there is any evidence tending to establish it. But whether the evidence tends to establish fraud, or not, is always a question of law for the court.

An application for a commission to take testimony is a *motion*, as defined in sec. 401 of the code, and must be made within the district in which the action is triable, or in a county adjoining that in which it is triable.

Accordingly, where the place of trial was the county of *Steuben*, and a commission was issued, and the interrogatories settled and allowed, by the county judge of *Onondaga* county, upon notice: *Held* that the county judge had no power to hear the application and allow the commission, and that the deposition taken under such commission was properly rejected.

A county judge has no power or authority to settle and allow interrogatories, to be annexed to a commission, in an action pending in the supreme court.

APPEAL from a judgment entered at a special term, upon the verdict of a jury. The action was brought upon a written contract between the parties, dated November 29, 1852, by which the plaintiff sold to the defendant the timber standing upon a lot owned by him, in Steuben county, for the sum of $7500, payable in installments at different times. The action was brought to recover the last installment. The defense was, that the defendant was induced to enter into the contract by the fraudulent representations of the plaintiff as

to the number of trees upon the lot, and that the contract was therefore null and void. The cause was tried at the Steuben circuit, in May, 1856. The plaintiff had a verdict for the amount due upon the contract, with interest. The facts are sufficiently set forth in the opinion.

Sedgwick, Andrews & Kennedy, for the appellant.

W. Barnes, for the respondent.

By the Court, JOHNSON, J. It is fairly to be inferred, I think, from the evidence, that the number of trees upon the land, at the time of making the contract, was much less than the plaintiff had been informed it was, according to his representations to the defendant. This, however, is of no moment in this action, unless the representations were fraudulent. It is not alleged in the answer, nor is there any thing in the evidence to show, that the plaintiff, at the time he entered into the contract, had any knowledge of the number of trees, except what he had derived from others, who had counted them with a view of making a purchase.

The law will not presume that the owner of land knows the number of trees standing in a forest upon it, in the absence of proof of such knowledge. But here the defendant was expressly informed by the plaintiff, that he did not know the number of trees, except as he had been informed. If the exact number of trees was deemed a matter of importance by the defendant, in making the contract, he had an opportunity to count them, and might have counted for himself. Though he might, if he chose, instead of going to that expense and trouble, rely upon the information in that respect which the plaintiff pretended to possess, holding him responsible for a correct and truthful statement of such information. Neither party could expect in such a transaction as the sale of standing timber, to arrive at any thing like accuracy in respect to quantity, when such timber should be reduced to

square timber or boards. Because, even if the number of trees could be accurately ascertained, the contents of each, standing, in cubic feet, or board measure, must necessarily be matter of opinion merely.

And taking the answer to be true, as to what the plaintiff represented to the defendant he had been told by different persons who professed to have counted the trees standing, it must have appeared that some had made the number one third, and some one half, less than others. A discrepancy so great in the statements of persons who pretended to have ascertained the exact number by count, must, it would seem, have attracted the attention of a person accustomed to deal in such property. How much reliance he must have placed upon such statements, respecting the number of trees, would have been a question for the jury, had the case been submitted to them.

The *gist* of the defense consisted in the allegation that the plaintiff misrepresented, to the defendant, the information which had been communicated to him by the several persons who had undertaken to count the standing trees, with intent to mislead and deceive, and by that means did mislead and deceive the defendant in respect to the number of trees, and the quantity of timber and lumber they contained.

This the defendant was bound to prove affirmatively, or his defense failed entirely. The *onus* was upon him of proving, not only what statements the plaintiff made to the defendant, but also the statements made to the plaintiff, by the persons who had counted, or who professed to have counted, the trees. This he undertook to do. But when the evidence was closed, there was manifestly, as it seems to me, nothing in it which tended in any degree to establish the fact of misrepresentation. There was nothing to show that Bliss had not made the precise statement to the plaintiff which the plaintiff made to the defendant. And the representation contained in the answer, in reference to Packer's statement, was shown upon the trial to be substantially true, as to the number ascer-

tained by him, and his communication to the plaintiff. He, it seems, wanted timber for a particular purpose, and counted about 1500 trees which would answer for that purpose, rejecting some two or three hundred trees which others had marked as fit to be cut for timber or boards. And it appears from his testimony, that he informed the plaintiff how he had counted, and what he had rejected as unfit for his particular use. Fraud is a question of fact for a jury where there is any evidence fairly tending to establish it. But whether the evidence tends to establish fraud, or not, is always a question of law for the court. The learned justice was right, therefore, in directing a verdict and refusing to submit the question of fraud to the jury. It follows that the judgment must be sustained, unless there was some error committed upon the trial, in receiving or rejecting evidence.

The evidence offered by the defendant, to prove the quantity of the hewed timber in cubic feet, or board measure, was properly rejected as immaterial. The main question was as to the number of trees, which the plaintiff had been informed there were standing upon the premises. If he had misrepresented in this particular, it was in no respect material whether the less number made more or less lumber in cubic feet, or board measure, than the general average of the whole number. The plaintiff could not set up that one half the number of trees had produced more lumber than the whole had been estimated at. But in any view, the evidence was wholly immaterial, until some evidence had been produced tending to make out fraud.

The evidence offered, to prove the number of trees actually ascertained by Bliss, at the count made by him, was properly rejected. The question was, what statement did Bliss make to the plaintiff on the subject, and not what he knew, or had in fact ascertained, before making such statement. If Bliss deceived the plaintiff, the defendant cannot avail himself of that deceit in this action. The evidence offered had no tendency to prove the plaintiff's statements to the defendant to

be untrue. Its tendency would have been to prove that Bliss had deceived the plaintiff, which was wholly immaterial.

But a more important question arises, upon the rejection of the commission, and the examination of Bliss as a witness, taken under it. The commission was issued, and the interrogatories settled and allowed, by the county judge of Onondaga county, upon notice. The place of trial designated was Steuben county, in which the plaintiff resided, and where the timber was situated. The plaintiff did not appear before the county judge, upon the application for the commission, nor upon the settlement and allowance of interrogatories. After the most careful consideration of the question, I have come to the conclusion that the commission, and the deposition of the witness, were properly rejected. Under the revised statutes, although certain judges of county courts acted as supreme court commissioners, and performed certain of the duties of a judge of the supreme court at chambers, the power to award a commission, to examine a witness in actions in the supreme court, was expressly withheld from all supreme court commissioners and judges of any county courts. (2 *R. S.* 394.) The judiciary act authorized an application for a commission, in any action at law, in the supreme court, to be made to any justice of the supreme court, or county judge at chambers, in the county of his residence, in whatever county of the state the venue in such action might be laid. Then followed the code, in which, as I think, the powers conferred by the judiciary act, in this respect, upon all supreme court and county judges are taken away, and the power limited to judges within the county in which the action is triable, or in an adjoining county. Section 403 confers upon the county judge, within his county, the powers of a judge of the supreme court at chambers, according to the existing practice, except as otherwise provided in the code. Section 401 prescribes where all motions, in actions, must be made. This section provides that all motions must be made within the district in which the action is triable, or in a county adjoining that in which it is

triable. The application in question was clearly a motion, as defined in this section. The action was, at the time the motion was made, triable in Steuben county only, within the intent and meaning of § 401. This, in my opinion, is entirely clear, and the weight of authority is decidedly in favor of this exposition. It follows, in my opinion, inevitably, that the county judge of Onondaga county had no power to hear the application, and order the commission. It is a statutory power, and it can scarcely be pretended that the county judge had power to hear and determine an application in a county where the party had no right to make it. It is argued that the code does not take away the power conferred by the judiciary act upon county judges, in this particular. But it will be found, I think, that it does, by the most clear and decisive implication. The power is only conferred by implication, in the judiciary act. Its language is, "an application may be made" "to any justice of the supreme court, or county judge, at chambers in the county of his residence," &c. It only prescribes, in terms, where the application may be made, but by implication confers the power upon the officer named in the county, to hear and determine. The code, in the section referred to, prescribes the county in which the motion must be made, and as clearly, and by the same implication, takes away the power from all judges residing elsewhere. The judge granting the order for the commission, having no power to hear the application in this action, the commission was a nullity and no regular deposition could be taken under it.

But if I am mistaken in this, the county judge had no power or authority to settle and allow interrogatories. This is a distinct and separate matter from ordering or allowing a commission to issue. Under the revised statutes he had no such power, and the judiciary act did not confer it. Under the last named act, the interrogatories were still to be settled by a justice of the supreme court. (2 *R. S.* 394, § 14.) At the adoption of the code, there was, therefore, no existing practice of county judges, in any county, settling interroga-

tories to be annexed to a commission in actions in the supreme court.

Upon either of these grounds the deposition was properly rejected.

The judgment must therefore be affirmed.

[Monroe General Term, December 7, 1857. *Johnson*, *Welles* and *Smith*, Justices.]

Ely and others *vs.* The City of Rochester.

26 133
49 121
62 631
1h 402
7h 356
56h 296
56h 297

Where a municipal corporation, by virtue of the power conferred by its charter, attempts to exercise the right of eminent domain, not by taking private property for public use, but by repairing, improving and fitting for a safer and more convenient public use that which has already been taken, the power to do the act—in the absence of any limitation placed thereon by the sovereign authority—necessarily includes the right of determining upon the plan and mode of doing it. No action, therefore, will lie to restrain the corporation from doing the work upon the plan adopted by it.

Thus where, in an action against the city of Rochester, it appeared from the complaint that the corporation was proceeding to rebuild upon a specified plan a bridge across the Genesee river, upon the same site on which a bridge had been maintained and used, as a public thoroughfare for a number of years, and the ground of the action was that the bridge, if constructed upon such plan would, when completed, cause an addition to the back water, upon the plaintiffs' mills, in periods of high water, and occasion a detention of their mills longer than would otherwise occur from that cause, and thus produce injury and damage to the plaintiffs, for an indefinite period; and that another plan might be adopted and carried out, with less prejudice to the interests of the plaintiffs; the right of the public to a passage over the river, by means of a bridge, and the right of the city, in its corporate character, to construct a bridge at that point, not being questioned; and there being no pretense that the plan adopted was not in every respect suitable and proper for the bridge, so far as related to the public interests and convenience; *Held* that this was not a case in which the law gave a right of action to the plaintiffs.

The authority which the corporation attempts to exercise, in such a case, is of a public nature, and for the interests, necessities and convenience of the public; and being lawful in its character, all private rights and interests are, to a certain extent, subordinate to it. The injury, if any, resulting to individual rights, from such acts, is *damnum absque injuria*, for which no action lies.

Ely *v.* City of Rochester.

THIS was an appeal from a judgment rendered at special term, against the plaintiff, upon demurrer to the complaint. The suit was instituted to restrain the erection of a bridge across the Genesee river, in the city of Rochester, upon the plan proposed by the defendants, on the ground that the erection would obstruct the passage of the water in the stream, and set it back upon the plaintiffs' mills. The plaintiffs are all owners of mills and hydraulic privileges situate upon the river, above the bridge proposed to be erected. The complaint stated that Rochester, Carroll and Fitzhugh were, prior to 1817, proprietors of a large tract of land upon the west bank of the river, and that Johnson and Seymour were proprietors of a like tract on the east side. That there is a rapid or fall in the river, upon these two tracts of land, of eighteen or twenty feet. That these proprietors subdivided their several tracts and laid out thereon mill-sites, and constructed canals for conducting the water of the river to such sites; and the plaintiffs severally deduce title to their respective mill-sites and hydraulic privileges, from one or the other of these proprietors. That the water used for propelling the plaintiffs' mills is taken from one or the other of the canals so constructed, and is discharged through tail-races into the river below the falls, but above the bridge proposed to be erected, and that the water has been so used and discharged for more than twenty years; that in 1824 a bridge was erected across the river with two stone piers in the channel of the river, and with stone abutments, one at either end, which bridge still continues. That the defendants propose to erect a solid stone bridge on the site of the old bridge, with five stone arches to be supported by four piers in the channel of the river, and with stone abutments at either end. That since the erection of the bridge in 1824, the channel of the river, both above and below the bridge, has been considerably contracted by solid erections, and so as to set back the water of the river, particularly in times of high water in the river, on to the plaintiffs' mills and machinery, and seriously impede their operation. That the bridge

proposed to be erected by the defendants will occasion a very serious additional obstruction to the free flow of the water of the river, and will greatly increase the back water upon the mills and machinery of the plaintiffs, particularly in times of high water, which generally occurs twice in each year, and will occasion a detention of the mills and machinery of the plaintiffs several days, at each return of high water, longer than they would otherwise be detained or obstructed by back water; and that the plaintiffs will sustain great and irreparable loss and damage by the proposed erection. That a stone bridge might be erected with three arches and two piers in the river at no greater expense, which would be equally safe and secure, and would not materially damage the plaintiffs. The complaint prayed for a perpetual injunction and for general relief.

The grounds of demurrer were: that there was a misjoinder as well as a defect of parties, both plaintiffs and defendants; and that the complaint did not state facts sufficient to constitute a cause of action.

S. Mathews, for the plaintiffs.

J. C. Chumasero and *T. C. Montgomery*, for the defendants.

By the Court, JOHNSON, P. J. Neither the right of the public to a passage over the Genesee river, by means of a bridge, nor the right of the city, in its corporate character, to construct a bridge at the point where the bridge is about to be constructed, is denied, or in any manner drawn in question by the complaint. Indeed it appears plainly, on the face of the complaint, that the defendants are only proceeding to rebuild, upon the same site on which a bridge has been maintained and used, as a highway or public thoroughfare, for a great number of years past. The action is not to prevent the construction of a bridge, but only to restrain its construction upon the plan adopted. It is the plan, and not the structure

upon some other plan, which is complained of, and sought to be defeated.

The ground of complaint, and of the action, is simply that the bridge, if constructed upon the present plan, will, when completed, cause an addition to the back water upon the plaintiffs' mills, in periods of high water, and occasion a detention of their mills, longer than they would otherwise be detained from that cause, and thus produce injury and damage to the plaintiffs for an indefinite period. The injury apprehended is to be occasional, and temporary only in duration, when it shall occur.

This presents the question whether the law, for such an injury from such a cause, gives the injured party any right of action. The right which the defendants assume to exercise in the acts complained of, is manifestly that of eminent domain, which is necessarily conferred upon municipal corporations for such purposes. (*Angell on Corp.* § 457.) It is exercised in this instance, not in taking private property for public use, but in repairing, improving and fitting, for a safer and more convenient public use, that which has already and long since been taken. The power to do the act, where no limitation is placed upon it by the sovereign authority by which it is granted, necessarily includes the right of determining upon the plan and mode of doing it. The material to be used, the architectural design in reference to cost, solidity, duration and convenience, are all within the exclusive jurisdiction and control of the officers in whom the power is vested. If the right should be conceded to the plaintiffs, of interposing by action, to prevent the erection on the present plan, some other person might, for a similar reason, prevent the construction of another on the plan proposed by the plaintiffs, and the result might be that the public would be deprived, wholly, of the enjoyment of an indisputable and essential privilege. There is no pretense that the plan adopted is not, in every respect, suitable and proper for the bridge, as respects the public interests and convenience. All that is claimed in this

respect is, that another plan might be adopted and carried out, with less prejudice to the interests of the plaintiffs. I am clearly of the opinion that the law affords to the plaintiffs no right of action in such a case. It is an established maxim that no action will lie for the consequences of an act done under lawful authority, if proper care and skill are exercised in performing such act. It will scarcely be pretended, I think, that this action can be maintained, if the plaintiffs could maintain none for the injury after the bridge was completed. And that none could be maintained in that case, for such a cause, seems to me extremely clear. The case falls exactly within the principle which has been repeatedly and uniformly applied to the opening and grading of streets, and the alteration, repairing and improvement of those already opened. The authority which the defendants are attempting to exercise is of a public nature, and for the interests, necessities and convenience of the public, and being lawful in its character, all private rights and interests are to a certain extent subordinate to it. The injury, if any, resulting to individual rights, from such acts, is *damnum absque injuria*, for which no action lies.

The rule established in *Wilson* v. *The Mayor &c. of New York*, (1 *Denio*, 595,) *Radcliff's Ex'rs* v. *The Mayor &c. of Brooklyn*, (4 *Comst.* 195,) *Graves* v. *Otis*, (2 *Hill*, 466,) *Boulton* v. *Crowther*, (2 *Barn. & Cress.* 703,) *Plate Glass Co.* v. *Meredith*, (4 *T. R.* 794,) is decisive of this action. It is unnecessary to notice the other questions raised.

Order affirmed with costs.

[Monroe General Term, December 7, 1857. *Johnson*, *T. R. Strong* and *Welles*, Justices.]

DONOVAN *vs.* WILLSON.

A contract for the delivery, at a future day, of an article to be thereafer manufactured, is not a contract for the sale of goods, within the statute of frauds, but for work and labor only. It need not, therefore, be in writing, signed by the party sought to be charged.

MOTION for a new trial, upon exceptions which were ordered to be heard at the general term in the first instance. The complaint alleged that on the 26th of September, 1854, John McElrone and Matthew Gorman entered into a contract with the defendant, by which the defendant agreed to manufacture, furnish and deliver to said McElrone & Gorman 60 barrels of beer, each and every week, from said 26th day of September, 1854, until the 1st day of April, 1855, and 90 barrels of beer each and every week thereafter, until the expiration of one year from the time said contract was entered into. It was further agreed by the defendant that he would furnish and deliver to McElrone & Gorman said beer at a price one dollar less per barrel than the wholesale market price in the city of Rochester, so that the said McElrone & Gorman could realize $1 upon each barrel more than the price to be paid by them to the defendant. In consideration whereof the said McElrone & Gorman agreed to receive and take the said quantity of beer from the defendant, and to pay him therefor the price aforesaid. The plaintiff further alleged that the parties entered upon the performance of said contract, and the defendant in pursuance thereof furnished and delivered to said McElrone & Gorman, between the 26th day of September and the 8th day of November, 1854, 247 barrels of beer, at $4 per barrel—the wholesale market price then being $5 per barrel—and the said McElrone & Gorman paid him on account thereof the sum of $880. The plaintiff further alleged, that on said 8th day of November, 1854, the defendant refused to deliver any more beer to McElrone & Gorman, in pursuance of said contract, and totally refused and neglected thenceforward to furnish any more beer, or in any way further to

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perform the contract, and that he had never since in any way performed the same. The plaintiff further alleged, that McElrone & Gorman duly performed all the conditions of said contract on their part, and were at all times ready to receive from the defendant the quantity of beer specified in the contract, and they repeatedly requested him to furnish the same, but he refused so to do. The complaint then averred an assignment of the contract, and all claims under the same, to him, by McElrone & Gorman, for a valuable consideration, on the 24th of April, 1856. The answer set up an agreement between the parties, similar to the one mentioned in the complaint, and admitted that after the defendant had delivered 250 barrels of beer in pursuance of it, he refused to deliver any more, on the ground that the price of barley had risen, and the price of beer in consequence; that no security had been given by McElrone & Gorman, according to the terms of the agreement, &c. On the trial a verbal contract, substantially the same as that set forth in the complaint, was proved. It was also proved that after the delivery of 244 barrels of beer, the defendant, on the 8th of November, 1854, refused to deliver any more. The judge before whom the cause was tried inquired of the counsel for the plaintiff if he designed to prove that there was any written agreement between McElrone & Gorman and the defendant. The counsel replied in the negative. The judge then stated that in his opinion there could be no recovery. The counsel for the plaintiff claimed that he was entitled to recover, at all events, for the deficiency from week to week; but the judge decided adversely to such claim. The counsel for the plaintiff then offered to show a performance by the assignors of the plaintiff of the contract, which was set out in the answer, but the court refused to allow proof on that subject; to which decision the counsel for the plaintiff excepted. The counsel for the plaintiff stated that under the intimation of the court he would offer no more testimony, and rested the case.

J. C. Cochrane, for the plaintiff.

T. Hastings, for the defendant.

By the Court, T. R. STRONG, J. The principle that a contract for the delivery at a future day of an article to be thereafter manufactured is not a contract for the sale of goods, within the statute of frauds, but for work and labor only, was adopted in this state in *Bennett* v. *Hull*, (10 *John.* 364,) and followed in *Crookshank* v. *Burrell*, (18 *id.* 58,) and also in *Sewall* v. *Fitch*, (8 *Cowen*, 215.) The latter case closely resembles the present. The action was upon a contract for the delivery of nails which were not on hand at the time of the contract, but were to be made thereafter. It was held that the case was not within the statute of frauds; that the contract was one for work and labor, and not for the sale of goods. Upon the authority of that case the same principle was applied by the court in *Robertson* v. *Vaughn*, (5 *Sand. S. C. R.* 1,) a case also much like the one at bar. The soundness of the principle is questioned in the case last cited, and also in *Downs* v. *Ross*, (23 *Wend.* 270,) and *Courtright* v. *Stewart*, (19 *Barb.* 455;) but in each of the two latter cases it was properly held that the principle was inapplicable to the case. The reported decisions on the subject, in this state, are all one way, and it is probable that the doctrine of those decisions has been uniformly applied in practice. It may be the doctrine is erroneous; but I will not, after the lapse of about half a century during which it has been allowed to stand, assume to be wise above what is written, and reject it as not law. If it is to be repudiated by the courts, the court of appeals should take the lead; but it more appropriately belongs to the legislature to prescribe a different rule, if the present one is not satisfactory, to govern future cases, without affecting past transactions.

A new trial must be granted, with costs to abide the event.

[MONROE GENERAL TERM, December 7, 1857. *Johnson, T. R. Strong* and *Welles*, Justices.]

HOTCHKISS and WELLS *vs.* GAGE.

Where a contract for the sale and purchase of goods is made, after the purchaser has inspected a part of the property—the whole being present at the time—and has weighed it, and a part of the purchase money is paid down, and the goods are delivered to a third person, to be by him delivered to the purchaser absolutely, on the payment of the balance of the purchase money, no action can be maintained by the purchaser—in the absence of an express warranty, and of all deceit or false representations—for a breach of waranty as to the quality of the goods.

In this state the only case in which warranty will be implied, on the sale of goods, is upon a sale by sample. In all other cases, the rule of *caveat emptor* applies, so far as the sale rests in contract.

APPEAL by the defendant from a judgment entered at a special term, upon the verdict of a jury. The action was brought upon a written contract for the sale and purchase of a quantity of oil of peppermint, to recover damages for an alleged breach of warranty. The answer was a general denial of the allegations in the complaint. The court denied a motion for a nonsuit, and the plaintiff obtained a verdict for $100.

D. Morris, for the appellant.

T. Hastings, for the respondents.

By the Court, E. DARWIN SMITH, J. The only point in this case in respect to which any allegation of error can be sustained, arises upon the motion for a nonsuit. The action is one of contract, upon a warranty of the quality of 24 cans of the oil of peppermint. No express warranty was proved, and the only basis for the claim, rests upon the language used in the contract or bill of sale describing the property. The language of the contract is, "This is to certify that I have this day sold, &c. twenty-four cans containing four hundred and seventy-eight pounds of pure oil of peppermint." When the plaintiff rested, he had proved this contract; that the defendant, on the day of the date of the contract, brought

the 24 cans of peppermint to the warehouse of Gov. Barry, in Michigan; that one of the plaintiffs and the witness, an agent for the plaintiffs, and others, were present. The cans of oil were set into the said warehouse, and the plaintiff Wells and the witness Hotchkiss examined three of them. One they found good and pure, and two they found impure. They then weighed the cans and found they weighed 478 pounds and 14 ounces. The contract of sale was then drawn, in which the weight of the cans is specified, and $800 of the purchase money was then paid. The contract provided that the oil should be left with Franklin Wells of Constantine, to be delivered by him to the plaintiffs when the balance of the purchase money should be paid. The contract was thus made after the plaintiff had inspected part of the property—the whole being present at the time—after the weight of it was ascertained; part of the purchase money was paid down, and the property delivered to a third person to be by him delivered absolutely on the payment of the balance of the purchase money.

In the absence of an express warranty, and of all deceit or false representations, I think it clear that in this state no action can be maintained in such a case. It was decided in *Seixas* v. *Woods*, (2 *Caines*, 48,) where peachum wood was sold as brazilletto, and described as brazilletto in the bill of sale, that no warranty was to be implied from the description of the property sold, contained in a contract of sale or bill of parcels. This rule has never been departed from, but has repeatedly been affirmed in this state, and among many others, in the case of *Hart* v. *Wright*, (17 *Wend.* 267; *S. C. in error*, 18 *id.* 449.) In *Waring* v. *Mason*, also in the court of errors, (18 *Wend.* 425,) and in *Beirne* v. *Dord*, (1 *Seld.* 98.) The only exception to this rule, and the only case of implied warranty recognized in the cases in this state, is upon a sale by sample. In all other cases the rule of *caveat emptor* applies, so far as the sale rests in contract. Of course there is a wide range for a recovery in cases of fraud or deceit,

or of false representations. The rule is otherwise in Massachusetts, and in most of the other states, which follow in this particular the rule of the civil law, that words of description in a contract, or bill of parcels, imply a contract of warranty that the property is of the kind, quality and description specified. Our rule requires the purchaser, if he means to rely upon a warranty, or to trust to it, to insist upon and obtain an *express warranty* at the time of the sale; otherwise he must look out for himself. In accordance with this rule the plaintiff should have been nonsuited at the trial, and the judgment should be reversed.

[Monroe General Term, December 7, 1857. *Johnson*, *Welles* and *Smith*, Justices.]

Gallaghar *vs.* Ashby.

Where a laborer who has done work for a contractor, upon a rail road, has given notice of his claim, under the 12th section of the general rail road act, and has sued and recovered judgment against the company, and issued execution thereon, and the same has been returned unsatisfied, a stockholder of the company, who has paid for his stock in full, cannot be compelled to pay the amount of such judgment, under section 10 of the said act.

The latter part of that section was designed to provide for the payment of the immediate servants, laborers and employees of the company itself, in contradistinction to the laborers employed by contractors, in the construction of the rail road; for which latter class provision is made in section 12 of the act.

APPEAL by the defendant from an order made at a special term, overruling his demurrer to the complaint. The complaint set forth the incorporation of the Lake Ontario, Auburn and New York Rail Road Company, under the general rail road act of April 2, 1850, and alleged that the company commenced the construction of their rail road, and in doing so contracted with Andrew J. Hackley and Marcus Hungerford to do the grading and excavating on said road at a given and stated price per yard; that said Hackley and

Hungerford underlet portions of said work to Daniel Sternburgh and others to do, by the yard; and in pursuance and in fulfillment of his agreement to do such work, the said Sternburgh employed the plaintiff as a laborer, in the building and construction of said road, and as such laborer he worked on said road in November and December, 1853, under the employment of said Sternburgh; that Sternburgh failed to pay him in full for his labor thereon; that in pursuance of section 12 of the general rail road law, he served a notice on the engineer of the company within the time therein required, and within the requisite time, by the provisions of said act, commenced an action against said rail road company to recover payment for such labor; and on the 25th day of February, 1854, judgment was rendered in his favor by Calvin Carpenter, Esq., a justice of the peace in and for Cayuga county, for $3.52 damages and $3.16 costs, which judgment was appealed from by the company to the county court of Cayuga county; which court, on the 18th day of January, 1855, reversed the judgment of the justice, with $22.54 costs, and from that judgment the plaintiff appealed to the supreme court; and on the 1st day of October, 1856, the judgment of the county court was reversed, and that of the justice affirmed, with costs, amounting in all to the sum of $91.24, for which sum judgment was duly entered in favor of the plaintiff, and against the said rail road company, and execution thereon was duly issued to the sheriff of Cayuga county, and the same was by him returned wholly unsatisfied, and the said amount now remans unpaid, due and payable to the plaintiff. And the plaintiff further alleged, that the defendant, by signing the articles of association of the said rail road company, became a subscriber for stock therein to the amount of the number of shares set opposite his name, which were five shares of fifty dollars each, and subsequent to that time payment was made, by the defendant, in full for the amount of stock subscribed for by him, and a certificate for said stock was duly issued to him by the

proper officers of the company, by means of which subscribing and payment the defendant became and was a stockholder of the said rail road company. The plaintiff demanded judgment against the defendant for $91.24, with interest and costs.

The defendant demurred to the complaint, and stated the following grounds of demurrer, viz: That the complaint did not state facts sufficient to entitle him to recover in this action; that it did not show that the plaintiff was a laborer or servant of the Lake Ontario, Auburn and New York Rail Road Company, that he performed any labor or service for them, or that there was any debt due or owing to him from them. The complaint showed that the plaintiff was the laborer and servant of Daniel Sternburgh, and not of the rail road company.

G. Giles, for the plaintiff.

J. R. Cox, for the defendant.

By the Court, E. Darwin Smith, J. The plaintiff was a laborer, under the 12th section of the general rail road act, of the Lake Ontario, Auburn and New York Rail Road Company, and had duly given notice of his claim for work done for a contractor, under that section, and had sued and recovered judgment in due form against the company, and issued execution thereon, and the same had been duly returned unsatisfied. All this is stated in the complaint. The defendant is a stockholder in said rail road company, and has paid for his stock, in full. The point raised by this demurrer is, whether as such stockholder the defendant is liable for this judgment, under section 10 of said rail road act. Section 10 of the act of 1850 is as follows: "Each stockholder of any company formed under this act shall be individually liable to the creditors of such company, to an amount equal to the amount unpaid on the stock held by him, for all debts and liabilities of such company, until the whole amount of

the capital stock so held by him shall have been paid to the company. And all stockholders of every company shall be jointly and severally liable, for all the debts due and owing to any of its laborers and servants, for services performed for such corporation, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part, against the corporation, and then the amount due on such execution shall be the amount recoverable, with costs, against such stockholders." The plaintiff is a creditor of the Lake Ontario, Auburn and New York Rail Road Company, and could obviously recover the amount of his judgment against any stockholder of such company who had not paid up his stock in full, provided an amount sufficient to cover said judgment remains unpaid upon his subscription to the capital stock of said company. But the defendant having paid up his stock in full, is not liable to pay the plaintiff's judgment, under the first branch of the section. His liability depends upon the construction of the latter branch of the section. This part of the section makes the stockholders of every company jointly and severally liable for all debts due and owing to any of its *laborers and servants* for *services performed for such corporation.* Was the plaintiff *such a laborer or servant?* I think not. This part of section 10 I think was designed to provide for the payment of the *immediate servants, laborers* and *employees* of the company itself, in contradistinction to the laborers employed by contractors in the construction of the rail road, or of any part of the work. Section 12 makes provision for this latter class of laborers. The provisions of section 12 are precise and definite in respect to this class of laborers. The rail road company is only liable for 30 days labor by any laborer, and that upon condition that notice is given to the company of such indebtedness, within 20 days after the performance of the labor, and that suit be commenced therefor within 30 days thereafter.

None of these provisions apply to the *laborers or servants*

for services performed for the corporation under section 10. Taking the two sections together, it seems to me quite clear that a distinction was intended by the legislature, between the class of laborers and servants directly employed by the rail road company and those employed by contractors, in the construction of the rail road of any company. For debts due to the first class of laborers and servants—those mentioned in section 10—the stockholders of every rail road company are made jointly and severally responsible, but not for those mentioned in section 12. The latter class have the responsibility of the corporation itself, and also that of each stockholder who has not paid up his subscription in full; but they have no right of action against an individual stockholder who has paid up for his stock in full. Such is the case with the defendant in this action, and he is not liable for the plaintiff's debt. The demurrer is well taken, and the judgment of the special term overruling the same should be reversed.

[Monroe General Term, December 7, 1857. *Johnson, Welles* and *Smith*, Justices.]

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Olcott *vs.* The Tioga Rail Road Company.

The statute of limitations is a good defense to an action brought against a foreign corporation, upon contract.

The exceptions in the statute of limitations, of cases where the debtor "shall be out of the state" when the cause of action accrues, or shall afterwards "depart from and reside out of the state," apply only to natural persons. Corporations therefore are not embraced in the exceptions.

In the application of the principle of *stare decisis*, the supreme court should regard the decisions of the supreme court of this state at any former period, as being the decisions of the same court.

There should, at some time, in the supreme court, be an end of discussion, when questions decided should be deemed at rest until the decision is reversed in the court of last resort. Such, as a general rule, should be the case with all questions carefully and distinctly decided by the former supreme court, upon full argument, or by the existing court, at any general term thereof. *Per* Smith, J.

There is, however, an obvious distinction between cases where the point decided was not the leading or chief point in the case—where it did not receive full discussion at the bar, or was incidentally decided, without full examination, and those cases where the point in question was singly presented, fully discussed by counsel, and distinctly passed upon by the court. *Per* SMITH, J.

APPEAL by the plaintiff from a judgment entered at a special term, upon the report of a referee. The action was brought upon a draft for $9064.71, made on the 19th of May, 1841, by the Tioga Navigation Company, now the Tioga Rail Road Company, on Hiram W. Bostwick, treasurer of the Tioga Coal, Iron, Mining and Manufacturing Company, payable to the order of Rogers, Ketchum & Grosvenor, and duly accepted. The referee found the following facts:

That the defendant, a foreign corporation, was created by act of the legislature of Pennsylvania. That James Wilson, as president of the Tioga Rail Road Company, (the defendant,) purchased of Rogers, Ketchum & Grosvenor, a locomotive for the use of said company, and in payment therefor, gave the draft upon which the action was brought. That the "Tioga Coal, Iron, Mining and Manufacturing Company," upon which the draft was drawn, was a company incorporated by the laws of the state of New York, operating a rail road connecting with the defendant's rail road at the state line, and running to Corning in the state of New York. That Hiram W. Bostwick was president of the last mentioned company, and as such, accepted the draft. That Wilson, as president of the first company, was authorized to draw, and Bostwick, as president of the last named company, was authorized to accept, such draft. That the locomotive purchased with said draft was used and operated upon the roads of the respective companies. That the purchase of the locomotive by Wilson, as president, and the giving the draft, was the act of the defendant, authorized at the time, and ratified afterwards. That the draft was duly protested for non-payment. That the plaintiff was the lawful holder of said draft. That the cause

of action did not accrue within six years next preceding the bringing of said action. The statute of limitations having been pleaded, the referee found, as a conclusion of law, that the plaintiff was barred from having and maintaining his action. He considered the precise question raised by the plaintiff, (to wit, that the defendant being a foreign corporation, and having no legal existence in this state, the case was within the exceptions of the statute as to persons residing out of the state,) was settled adversely to the plaintiff, in the case of *Faulkner* v. *Delaware and Raritan Canal Co.*, (1 *Denio*, 441.) He therefore decided that the plaintiff's claim was barred by the statute of limitations, and ordered a judgment of nonsuit.

Geo. T. Spencer, for the appellant. I. The referee having found sufficient facts to authorize a recovery by the plaintiff, except that the cause of action did not accrue within six years, the only question in the case is, whether the defendants, being a foreign corporation, and not capable of being in or returning to this state, can in an actiou in its courts avail themselves of that statute; in other words, whether a foreign corporation is within the exception embraced in section 27 of that title of the revised statutes commonly called the statute of limitations, and which is as follows: "If, at the time when any action specified in this article shall accrue against any person, he shall be out of this state, such action may be commenced within the time herein respectively limited after the return of such person into this state; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

II. The Tioga Rail Road Company being a corporation of the state of Pennsylvania, created by and under its laws, was never capable of having an existence elsewhere, and consequently, at the time the cause of action accrued, was out of

this state, within the exception of the statute. A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created, must dwell in the place of its creation, and cannot migrate to another sovereignty. (*Bank of Augusta* v. *Earle*, 13 *Peters*, 519. *Runyan* v. *Lessees of Coster*, 14 *id.* 129.)

III. A corporation is included in the term *person*, as used in the exception of the statute. In the first place, this is so declared in several statutes of this state. By the statute relating to crimes and their punishment, (2 *R. S.* 703, § 35,) "When the term person is used in this chapter to designate the party whose property may be the subject of any offense, such term shall be construed to include the United States, this state, or any other state government or country which may lawfully own any property within this state, and all public and private corporations." By the act concerning the revised statutes, passed December 10, 1828, section 11, (2 *R. S.* 778,) it is provided, whenever in the revised statutes, or in any other statute, any subject, matter, party or person is described or referred to by words importing the singular number or masculine gender, several matters and persons and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included, and these rules of construction shall apply to all cases, unless it be otherwise specially provided, or unless there be something in the subject or context repugnant to such construction. There is certainly nothing in the *context* of the statute under consideration repugnant to a construction of the word person as including corporations; for there is nothing further relating to the subject. Neither is there any thing in the *subject* of the statute repugnant to such construction; on the contrary, such a construction is the only one which will render the statute consistent. The proviso of the statute contains no exception in favor of foreign corporations, and it manifestly could not be its intention to give the creditor rights against one class of foreign debtors, and withhold such rights in regard to another, and a statute will not

be so construed as to lead to absurd, false or unjust consequences if it will admit any other construction. (*Smith's Com.* 662. *Commonwealth* v. *Kimball*, 24 *Pick.* 370.) And without any statutory definition, the term person embraces a corporation where a corporation may properly be within the object of the statute. Thus, under the attachment laws of the state of Alabama, corporations are included, although persons only are mentioned. (*Planters' Bank* v. ———, 8 *Porter*, 404.) And so also a corporation is a person, in the purview of acts of Congress, in relation to the jurisdiction of the courts. "A corporation created by and doing business in a particular state, is to be deemed to all intents and purposes a person, although an artificial person, an inhabitant of the same state for the purposes of its incorporation, capable of being treated as a citizen of that state as much as a natural person." (*The Louisville R. R. Co.* v. *Letson*, 2 *How. U. S. R.* 497, 555, 558. *Kilkenny Railway Co.* v. *Fielden*, 2 *Eng. Law and Equity*, 388, 391. 11 *Wheat.* 392.) A foreign corporation may sue and be sued in this state. (2 *R. S.* 457, §§ 1, 2. *Code*, §§ 135, 227, 427. *Laws of* 1855, *chap.* 279.)

IV. The statute of limitations, by reason of the exception in relation to persons being out of or departing from this state, never commences running until the return of such person to this state, and consequently cannot be pleaded by a person who has never been in this state. (*Ruggles* v. *Keeler*, 3 *John.* 263. *Randall* v. *Wilkins*, 4 *Denio*, 577. *Ford* v. *Babcock*, 2 *Sand.* 518. *Bulger* v. *Roche*, 11 *Pick.* 36. *Hull* v. *Little*, 14 *Mass. R.* 203. *Wilson* v. *Appleton*, 17 *id.* 180. *Little* v. *Blunt*, 16 *Pick.* 359. *Cole* v. *Jessup*, 2 *Barb.* 309. *Carpenter* v. *Wells*, 22 *id.* 593.) If the statute of limitations is not a good plea, as decided by the above cases, when the defendant was never in this state until the time when the action was commenced against him, notwithstanding more than six years had elapsed after the cause of action accrued, it follows that the *return* of the defendant is not essential to the right to bring the action after the expiration of the statute time.

The term *return* is only applicable to a person who has before been in this state. And such has been the construction of similar statutes in England. In the case of *Laford* v. *Ruddock*, (24 *Eng. L. and Eq.* 239,) the question was whether a plaintiff who had never been in England was within the exception of the statute of limitations of that country, providing that if any person entitled to bring an action shall be at the time such cause of action accrues beyond the seas, such person shall be at liberty to bring the same actions within such times as are before limited after their being *returned* from beyond the seas; it was held on the authority of *Strithorst* v. *Graeme*, (2 *Wm. Black.*) and on principle, that if the party having a right of action never comes to England, he always has a right of action while he lives abroad, notwithstanding, by the terms of the statute, he must bring his action within six years after his *return*, which has never happened, and that the statute never runs till the disability or cause of exception is removed. The same point was decided in the court of exchequer, in the case of *Townsend* v. *Deacon*, (3 *Exchequer R.* 706.) In that case the party in favor of whom the right of action existed died abroad more than six years after the same accrued, and of course never could *return*. And the point has been adjudged in the same way by the supreme court and court of appeals in this state. In *Benjamin* v. *De Groot*, (1 *Denio*, 151,) the action was against an executor. The defendant pleaded the statute of limitations. The plaintiff replied that, at the time the cause of action accrued, the defendant's testator was out of the state, and so continued till his death, and that the action was brought six years after the granting of letters testamentary. To which replication there was a demurrer, upon which judgment was for the plaintiff, on the ground that the statute had not begun to run in favor of the testator at the time of his death, and that the case, though not within the words of the exception of the statute, was yet within the equity of it. This is one of the cases where the person against whom the cause of action accrued never did and

never could *return*. The same point is decided in *Davis* v. *Garr*, (2 *Selden*, 124,) where the case of *Benjamin* v. *De Groot* is cited with approbation; also *Douglass* v. *Forrest*, (4 *Bing.* 686.) If the case of *The Delaware and Raritan Canal Co.* v. *Faulkner*, (1 *Denio*, 440,) the only authority for the defendants, is good law, then the statute of limitations would be a good plea in an action commenced by attachment or publication of summons against a non-resident debtor who never was in this state, either before, at the time of, or after the commencement of the action. For there would no more be a *return* in his case than in the case of a foreign corporation.

V. If the exception of the statute, as appears by all the authorities, includes a person who never has returned, and never could return, to this state, it follows that it may as well include a foreign corporation, notwithstanding any thing in its character or locality which forbids its physical return or existence in this state. Such a construction would not be repugnant to the subject of the statute, and would therefore be in accordance with the rule contained in section 11, page 778, vol. 2 of the revised statutes. And such has been the construction given to a similar statute of Vermont, by the supreme court of the United States. (*Society for the Propogation &c.* v. *Town of Pawlet*, 4 *Peters*, 480, 505, 506.) In that case the question was whether a corporation was included in the exception of a statute of limitation, providing that the act should not extend to bar any infant *person* imprisoned or beyond the seas, without any of the United States. The plaintiffs were a foreign corporation, and "being beyond the seas," within the proviso of that act, were held not to be barred. And by the recent decisions of the same court, the residence of a corporation is the state by which it is created, without regard to the residence of its corporators. (*Louisville R. R. Co.* v. *Letson*, 2 *How. U. S. R.* 499, &c. 7 *John. Ch. R.* 129. 7 *How. Pr. R.* 228, 239. 10 *id.* 7, 8. 5 *Paige*, 601.)

VI. The reason of the statute applies as well to foreign

corporations as to natural persons. The mischief which this exception was designed to meet was, that without it the citizens of this state would be compelled to go abroad to enforce their demands against persons who should be or go beyond the jurisdiction of our courts; and this mischief obviously affects the creditor of a corporation equally with the creditor of a natural person, and it will not be presumed that the legislature intended to exempt corporations from liabilities to which natural persons are subject. (*Bacon's Abr., Limitation of Actions, E. Id. Statute I*, 6. *Smith's Com.* 819. *The People* v. *The Utica Ins. Co.*, 15 *John.* 358. *Henry* v. *Tilson*, 17 *Vermont R.* 479. *United States* v. *Aundy*, 11 *Wheat.* 392.)

VII. The court will take judicial notice of the fact as a matter of daily public history, that this state contains the great commercial emporium of the United States, and indeed of the whole western continent; that this emporium is the seat and center of the vast and complicated transactions of almost numberless foreign corporations of every state of the union, and of foreign countries, whose financial affairs are there managed, and whose bonds and other evidences of debt are there negotiated; manufacturing corporations making purchases on credit; insurance companies incurring liabilities, and rail road companies issuing stocks and borrowing money. (1 *Greenl. on Ev.* § 5.) The transactions of natural persons who are, or who go, out of this state are few and of small moment, when compared with those of artificial persons called foreign corporations, who never come into this state except through their agents, to contract some debt which they seek to repudiate through the pretense that they can have no existence, and consequently no liability here. What can be more absurd than to suppose that the legislature intended to make a law for a small class of persons whose personal rights travel with them wherever they go, and whose coming or return to this state is always encouraged; and exempt that larger class of artificial persons, whose ex-

istence at home is merely recognized here as matter of comity towards the power by which they are created.

R. Campbell, for the respondent, among other points not noticed by the court, and therefore not necessary to be stated here, insisted upon the following: I. The cause of action set out in the plaintiff's complaint, and proven on the trial, is barred by the statute of limitations. It is a well settled principle of construction of statutes of limitation, not only of the United States courts but of the courts of the several states of the union, that the courts of each state are to give a construction of the statutes of their several legislatures, and when such construction has been given, the same is to govern in all cases, and in all courts of the union. The question at issue in this action, under the defendant's answer setting up the statute of limitations, has been decided by the supreme court of this state in *Faulkner* v. *Delaware and Raritan Canal Co.*, (1 *Denio*, 441.) The decision in that case was concurred in by each member of the court, and its correctness has not been questioned by any court in this state, (in any reported case,) and has been received and adopted by all the courts of this state as a settled construction of the statute of limitations upon the point in question in this action, viz: that the exception contained in 2 *R. S.* 297, § 27, applies to natural persons and not to corporations. When a corporation is said to be a *person*, it is understood to be so only in certain respects, and for certain purposes, for it is strictly a *political institution*. (*Ang. & Ames on Corp.* 3*d ed.* 4.) The statute in regard to work on highways, which declares that "every person owning or occupying land in the town" shall be assessed to work on highways, (1 *R. S.* 505,) has been adjudged not to include corporations. (*Bank of Ithaca* v. *King*, 12 *Wend.* 390.) The act in relation to attachments against absconding debtors, &c. (1 *R. L.* 157,) provides that the real and personal property of every debtor who resides out of the state, &c. shall be liable to be attached and sold, &c. The

court held this act applied to natural persons only, not to bodies corporate. (*McQueen* v. *Middletown Manuf. Co.*, 16 *John.* 5.) Generally the term persons will be confined to natural persons, unless from the context or other parts of the act it appears that corporations were intended. (*School Directors* v. *Carlisle Bank*, 8 *Watts' Penn. R.* 192. *Blair* v. *Worley*, 1 *Scam. Ill. R.* 178.) The case cited by the appellant's counsel—*Louisville Rail Road Co.* v. *Letson*, (2 *Howard*, 558)—is not a construction of a state statute, but of a statute of the United States, in regard to commencing suits in the United States courts; and the decision declares that for such purposes, (*i. e.* the commencing a suit,) a corporation is to be deemed a person or inhabitant of the state where located; not that a corporation shall be deemed to be a person in any other state, or within the purview of any other state statute. The supreme court of the United States could not overrule the construction put upon a statute of limitations of this state, by the supreme court of this state, without repudiating and nullifying all its former decisions as to the power of state courts to construe the state laws of the several states. (*Ang. on Lim.* 25. 3 *Peters*, 270. *U. S. Judiciary Act*, 1789, § 34. *Pittsburgh Trans. Co.* v. *Cullen*, 8 *Ser. & Rawle*, 517. *Nash* v. *Rector*, 1 *Miles' Penn. R.* 78. *Dawson* v. *Campbell*, *Id.* 171. 4 *Zabriskie*, 222. 3 *id.* 429. *Peckham* v. *North*, 16 *Pick.* 286. 9 *Paige's Ch. R.* 216. 15 *Ser. & Rawle*, 173. *Ang. on Corp.* 396, 397, 398.) The statute is general, and applies to all the causes of action mentioned in it. If the plaintiff claims the benefit of an exception, he must bring himself within the very letter of the exception. (*Ang. on Lim.* §§ 194, 485, 486.)

II. The legal presumption is, that the draft in question has been paid.

By the Court, E. DARWIN SMITH, J. Whether the statute of limitations is a good defense in behalf of a foreign corporation in an action upon contract, is the only point presented in this case for our decision. The referee has found,

as a conclusion of law, that the plaintiff's debt is barred by the statute of limitations, and that the defendant was entitled to a nonsuit on that ground. His decision was expressly put upon the case of *Faulkner* v. *The Delaware and Raritan Canal Co.*, (1 *Denio*, 441,) in which the precise point held by the referee is distinctly decided, and we are now confessedly asked, by the counsel for the plaintiff, to overrule that decision. If we were sitting in a court of review, the correctness of that decision, upon principle, would be a legitimate question for discussion and consideration. The case of Faulkner was decided in the old supreme court, about 12 years since. It was decided by a unanimous court, was acquiesced in then, and has been since, without debate or question, so far as we know, till the present occasion. This court, as now organized, is the supreme court still, with the same powers, and governed by the same rules and principles as the old supreme court under the former constitutions of this state. In the application of the principle of *stare decisis* we should regard the decisions of the supreme court of this state at any former period, as the decision of the *same court* in which we are now sitting. It becomes, therefore, an important inquiry, how far, and upon what principle, this court is at liberty to depart from the doctrine of *stare decisis*. Chancellor Kent lays down the rule as follows: "When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the *same court*, except for very cogent reasons and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of uncertainty as to the law." (16 *John.* 402. 20 *id.* 722.) Sir William Jones also says: "No man who is not a lawyer would ever know how to act, and no man who is a lawyer would in many instances know what to advise, unless courts were bound by authority, as firmly as the Pagan deities were supposed to be bound by the decrees of fate." (*Jones' Essay on Bail.* 45.)

The 3000 cases overruled, doubted or limited in their ap-

plication, mentioned in *Greenleaf's Overruled Cases*, indicate that the tendency to assert and to carry out what is supposed to be the right in point of principle, is much greater than that of abiding by precedents and of adhering to decisions. And there is doubtless much greater danger of departing from the sound rule on this subject, in the present organization of this court, divided as it is into eight heads, than there was when the court possessed the unity of a single head, as under the former constitutions of the state. While with the larger number of judges, the press of business upon the court, and the multiplicity of decisions, the proportion of crude and hasty opinions will necessarily be increased; and while it is the duty of the judges to meet all questions upon principle, and discuss them with freedom and firmness, that justice and right may prevail, yet something, most obviously, should be deemed settled in this court. There should, at some time, in this court, be an end of discussion, when questions decided should be deemed at rest, until the decision is reversed in the court of last resort. Such, as a general rule, should be the case with all questions carefully, clearly and distinctly decided by the old supreme court upon full argument, and by any general term of this court as at present organized. There is, however, an obvious distinction between the cases where the point decided was not the leading or chief point in the cause; where it did not receive full discussion at the bar, or was incidentally decided, without full examination, and those cases where the point in question was singly presented, fully discussed by counsel, and distinctly passed upon by the court. The case of *Faulkner* was one of the latter case. The question of the statute of limitations was the only one in the case. The point was distinctly presented on demurrer, unconnected with any other question. It was, we may presume from the character of the counsel employed, fully and carefully argued, and was distinctly and singly decided by the court, without dissent or objection. Such a decision should ordinarily be followed, until reversed by the court of appeals.

In accordance with this view, I think the judgment in this case should be affirmed, upon the principle of *stare decisis*. But as the case is one of great importance, and involves a large amount, I will add that I fully concur in the opinion of Judge Beardsley, in the case of Faulkner. This action is one of contract, upon bills of exchange, and was commenced September 19, 1853. At that time, by section 91 of the code, all actions upon a contract, obligation or liability, express or implied, were limited to six years. The only exception applicable to this class of actions is contained in section 100, which is as follows: "If, when the cause of action shall accrue against any person, he shall be out of the state, such action may be commenced within the times herein respectively limited, after the return of such person into this state; and if after such cause of action shall have accrued, such person shall depart from and reside out of the state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

By clear and necessary implication this section can only apply to *natural* persons. None others possess the power of locomotion. None others can be *out* of the state at one time and *in* it at another. None others can *depart* from and *reside* out of the state and *return* again to it. In respect to none others can the *time of their absence* be deducted from the time limited for the commencement of the action. The residence of a corporation is necessarily fixed in the state of its creation. It can have no residence elsewhere. (13 *Peters*, 519. *Bank of Augusta* v. *Earle*, 14 *id.* 129. *Runyan* v. *Lessees of Coster*, 2 *How. U. S. R.* 499.) If this section does not apply to corporations, then the general limitation of section 91 applies, without qualification, or restriction, to all actions upon contract, and is available to a foreign as much as to a domestic corporation. The judgment in this case should be affirmed.

[Monroe General Term, December 7, 1857. *Johnson*, *Welles* and *Smith*, Justices.]

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P. CHAMBERLAIN *vs.* JEFFREY S. BARNES and ALVA MORGAN.

Where a deed of conveyance was given by a father to his son, and a bond and mortgage executed by the latter for the purchase money, for the purpose of hindering, delaying and defrauding creditors, which bond and mortgage were subsequently sold and transferred to the plaintiff, who took the same with notice of the fraudulent object and purpose for which they were given, *it was held* that for all purposes of enforcing such bond and mortgage, or claiming any protection under them, the plaintiff stood in no better situation than the parties to the original fraudulent transaction. And that the law would lend him no aid whatever, in preserving his lien upon the premises, or in making the fraudulent securities available in any respect.

APPEAL by the plaintiff from a judgment entered upon the report of a referee. Jeffrey S. Barnes, being the owner of several village lots in Holley, Orleans county, on the 4th day of September, 1851, sold and conveyed the same to Aaron Barnes his son, and the latter, to secure the payment of part of the purchase money, executed a bond and mortgage to Jeffrey S. Barnes, conditioned to pay $850 in two years, with interest. On or about the 5th day of September, 1851, Jeffrey S. Barnes, by Aaron Barnes, his agent, sold and transferred this bond and mortgage to the plaintiff, and took his note for the same in the sum of $700, payable in two years from its date, with interest. After the sale and transfer of the bond and mortgage to the plaintiff, he delivered the mortgage to Aaron Barnes to have it recorded in Orleans county. Jeffrey S. Barnes took the mortgage from the clerk's office, with the assignment, and delivered the mortgage, note and assignment to the defendant Alva Morgan. Jeffrey S. Barnes, notwithstanding the assignment to the plaintiff, acknowledged satisfaction of the mortgage, and caused it to be discharged of record, without the knowledge or consent of Chamberlain, the plaintiff. Chamberlain still retained the bond. Aaron Barnes then, on the 29th day of November, 1851, reconveyed the mortgaged premises to Jeffrey S. Barnes, and the latter executed a mortgage upon the same to the defendant Morgan for the sum of $900. Morgan not only knew that the plaint-

iff, Chamberlain, was the owner of the mortgage given by Jeffrey S. Barnes, and assigned, but knew that the note was given on the sale of the mortgage; that it was improperly, and without authority, discharged by Jeffrey S. Barnes, and he took Chamberlain's note as security against such mortgage. Alva Morgan proceeded to foreclose his mortgage by statute, and this action was brought, and the prayer for judgment was, that the satisfaction of the mortgage executed by J. S. Barnes be declared void; and that this mortgage be declared to be a lien upon the land prior to the mortgage of Morgan. The answer set up that the bond and mortgage given by Jeffrey S. Barnes to Aaron Barnes, and sold to the plaintiff, was given to defraud creditors, and that the plaintiff knew this fact when he purchased the mortgage; and claimed that the bond and mortgage and the assignment thereof were void. The referee found the giving of the bond and mortgage by Jeffrey S. Barnes to Aaron Barnes, and the sale of the same to the plaintiff, and the giving of his note for the sum of $700, as alleged in the complaint; that the bond and mortgage were given to defraud the creditors of Barnes, and that the plaintiff knew this fact; that Morgan knew of the mortgage assigned to Chamberlain, and that he was the owner thereof; that Jeffrey S. Barnes let Morgan have the note by agreement with Morgan, to keep until Chamberlain would ratify the discharge of the mortgage and surrender the bond; that afterwards Morgan let Jeffrey S. Barnes take the note, who sold it to Charles Seymour; that it became due, and Seymour sued Chamberlain, who paid the note. The referee declared the bond and mortgage void for the fraud, and dismissed the complaint, with costs.

M. S. Newton, for the appellant.

S. B. Jewett, for the respondents.

By the Court, JOHNSON, P. J. The referee has found, as matter of fact upon the evidence, that the deed of conveyance from the defendant Jeffrey S. Barnes to his son Aaron Barnes, and the bond and mortgage given back by the latter, were for the purpose of hindering, delaying and defrauding creditors. He also finds that the plaintiff knew, and had notice of, such object and purpose. The plaintiff therefore, for all purposes of enforcing his bond and mortgage, or claiming any protection under them, stands in no better situation than a party to the original fraudulent transaction. In this aspect the case falls directly within the principle established in *Nellis* v. *Clark*, (20 *Wend.* 24; *S. C.* 4 *Hill*, 424.) The law will lend him no aid whatever in preserving his lien upon the premises, or in making the fraudulent securities available for any purpose. It is claimed by the plaintiff's counsel that the plaintiff, in respect to his mortgage, stands in the position of a grantee of premises, and even if the mortgage is fraudulent, the defendants cannot dispute its validity. This would be so if the mortgage conveyed the title to the land, and it became vested in the plaintiff by the assignment. The law would then, as to the parties and privies, and all claiming under them, or either of them, by grant or assignment, leave the title where the fraudulent act had placed it. But a mortgage upon real estate has no such effect. It is a mere lien upon the land and as security for the debt, and carries no title. (*Gardner* v. *Heartt*, 3 *Denio*, 232. *Calkins* v. *Calkins*, 3 *Barb.* 505.) The bond, which is the debt, is clearly an executory contract, and the mortgage being but a security for the debt, partakes of the same character. The case of *Mosely* v. *Mosely*, (15 *N. Y. R.* 334,) which is relied upon, is not in point. That was the case of a deed, and the long established principle which was applied properly there, has no application here.

The subsequent fraudulent acts of the defendant Barnes, in executing a satisfaction of the mortgage, and transferring the plaintiff's note, do not help the plaintiff. Those acts, fraudulent and injurious as they certainly were, did nothing towards

purging the bond and mortgage of their original taint. And it is precisely because of this taint, that the law withholds from them any aid, protection or regard.

The judgment must therefore be affirmed.

[MONROE GENERAL TERM, December 7, 1857. *Johnson, T. R. Strong* and *Welles*, Justices.]

MORGAN *vs.* CHAMBERLAIN and others.

Where the plaintiff took a mortgage from B., with full notice of a prior mortgage upon the same premises, which had been assigned to, and was then held by, C., and with knowledge that B., notwithstanding such assignment and without the authority and sanction of C. as assignee, had executed a discharge of such prior mortgage; *Held* that the plaintiff, being a mere voluntary purchaser or mortgagee, did not occupy the position of a general creditor of B., and therefore was in no better situation to attack C.'s mortgage than was B. himself; that he stood, in this respect, in the shoes of B., and must receive the same measure of justice which would have been meted out to B. had he undertaken, by action, to legalize the fraudulent discharge and to destroy or impair the apparent lien of C.'s mortgage.

Also held, that upon the principle of refusing aid to either of the parties to a fraudulent transaction, the plaintiff was not entitled to a decree declaring his mortgage to be the first lien, and the discharge of the prior mortgage to be legal.

APPEAL from a judgment entered upon the report of a referee. The complaint alleged that on the 4th day of September, 1851, Jeffrey S. Barnes was in embarrassed circumstances, and being the owner of certain lands in Holley, Orleans county, with the intention of defrauding his creditors, conveyed the lands to Aaron Barnes, and took back two mortgages; one to his wife, and another to himself; that it was the understanding that the bond and mortgage to himself, Jeffrey S. Barnes, should not be paid; that Jeffrey S. Barnes sold and transferred the bond and mortgage payable to him

to Philetus Chamberlain, and took his note for the same in the sum of $700, payable in two years; and that it was the understanding between Chamberlain and Jeffrey S. Barnes, that Barnes might surrender the note and take back the bond and mortgage; and that Barnes kept the note until the 29th day of November, 1851, on which day Aaron Barnes re-deeded the premises to Jeffrey S. Barnes; that Jeffrey S. Barnes acknowledged satisfaction of the bond and mortgage assigned to Chamberlain, and gave a bond and mortgage to Alva Morgan, the plaintiff, upon the same premises, with the knowledge and co-operation of Morgan, and delivered Chamberlain's note to Morgan, to be given back to Chamberlain in place of his mortgage. The complaint then alleged that he, Morgan, let Barnes take Chamberlain's note to be delivered to Chamberlain in exchange for Chamberlain's bond and mortgage; but that Barnes, instead of giving the note to Chamberlain, turned it out to Charles Seymour. That Jeffrey S. Barnes gave a deed of the premises to Chamberlain to secure him against said note; that Chamberlain has since occupied the land by his tenants; that Morgan was foreclosing his mortgage by statute; that Seymour sued Chamberlain on the note and collected it.

The complaint demanded judgment, that the mortgage of the 29th day of November, 1851, given by Jeffrey S. Barnes, be declared the first lien; that the discharge of the mortgage assigned to Chamberlain be declared to be legal; and that Morgan's mortgage be declared to be a lien prior to the mortgage assigned to Chamberlain. The answer of Chamberlain admitted that he was sued and paid the note; set up the several matters stated in his complaint in the case of Chamberlain against Morgan; and denied all the allegations in the complaint which charge him with any connection or understanding with Jeffrey S. Barnes, and all the allegations of the complaint, except those which showed that he was entitled to his mortgage, and to have the same declared a lien; and to have the discharge of the same, which was wrongfully made,

vacated. The referee found the facts in this case, as in the case of Chamberlain against Morgan. And he decided, as matter of law, that the mortgage to Morgan was a prior lien to the mortgage assigned to Chamberlain; that Chamberlain's mortgage was fraudulent and void as against the mortgage of Morgan, and ordered the usual judgment of foreclosure of the Morgan mortgage and the sale of the mortgaged premises, cutting off the equity of redemption, with costs to be paid out of the land. The proof showed the execution of the deed by Jeffrey S. Barnes to Aaron Barnes, and the giving back of the mortgage by Aaron Barnes, and the sale of this mortgage to Chamberlain, as claimed in the answer. That Jeffrey S. Barnes, notwithstanding the assignment, illegally discharged that mortgage without any right or authority from Chamberlain. That Morgan knew all about this mortgage; and was privy to, and acted in, causing it to be discharged. That there was no arrangement whatever between Chamberlain and J. S. Barnes about keeping the note, or afterwards taking a deed to protect the note. The proof went to show that J. S. Barnes was in embarrassed circumstances at the time of giving the deed to Aaron Barnes, and the giving back of the mortgages; and that Chamberlain took possession of the premises, and received the rents.

The defendant Chamberlain appealed from the judgment entered upon the report.

M. S. Newton, for the appellant.

S. B. Jewett, for the respondent.

By the Court, JOHNSON, P. J. The plaintiff's mortgage is subsequent to the defendant's, and from the mortgagee, and assignor of the defendant's mortgage, who is also the grantee of the defendant's mortgagor. The fraudulent conveyance of the premises originally, for which the defendant's mortgage was given, was made by him. The plaintiff's mortgage was

made after the premises were reconveyed to such original owner by a voluntary conveyance, without any new consideration. The plaintiff, as respects the defendant's mortgage, is not a *bona fide* mortgagee. He cannot claim as creditor of Jeffrey S. Barnes, but as subsequent mortgagee, in a mortgage taken upon a voluntary bargain or agreement, between himself and his mortgagor. When he took his mortgage he had full notice of the defendant's mortgage. It was on record, and the referee has expressly found, as a fact in the case, that when the plaintiff took his mortgage, Jeffrey S. Barnes, his mortgagor, had executed a discharge of the defendant's mortgage, and then gave to the plaintiff the note, which the defendant had given on the purchase of his mortgage, with the agreement that the plaintiff should keep it until it could be ascertained whether the defendant would ratify the satisfaction and discharge of his mortgage, which had been executed without his assent. It thus appears that when the plaintiff took his mortgage he was perfectly aware of the existence of the defendant's mortgage, of its assignment to the defendant, and of the satisfaction without the authority or sanction of the defendant as assignee. Upon this state of facts it is clear that the plaintiff is in no better situation to attack the defendant's mortgage than Jeffrey S. Barnes himself. As a general creditor of Barnes, he might have proceeded to judgment and execution, and thus put himself in a position to attack the defendant's mortgage. But as a mere voluntary purchaser or mortgagee, he does not occupy that position. He stands in this respect in the shoes of his mortgagor, and must receive the same measure of justice which would have been meted out to such mortgagor had he undertaken by action to legalize the fraudulent discharge, and to destroy or impair the apparent lien of the defendant's mortgage. Upon the same principles, therefore, and for the same reasons, which prevailed in the other case, these parties should be left to stand in the position in which they have seen fit to place themselves by their own voluntary acts. The law will not lend its aid for

any purpose of relief. The case of *Moseley* v. *Moseley* (15 *N. Y. R.* 334) is conclusive on this question, in a case like this. The judgment must therefore be reversed, and a new trial ordered, with costs to abide the event.

[Monroe General Term, December 7, 1857. *Johnson, T. R. Strong* and *Welles*, Justices.]

Tallman and others *vs.* Turck.

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If goods be wrongfully taken by A., and B. afterwards comes into possession of them, the latter is deemed as much a wrongdoer as the original tortious taker; unless he establishes the fact, by proof, that he came to the possession in good faith and for a lawful purpose. In the absence of such proof no demand need be made of him.

This rule applies where the original taking of the goods was by permission of the owner, but the latter was led to give the permission by such a fraudulent deceit on the part of the purchaser as will avoid the sale, if the vendor chooses to avoid it.

APPEAL from a judgment entered at a special term, on the verdict of a jury in an action of replevin. The defendant claimed title to the goods in controversy, under and by virtue of an assignment executed to him by one George G. Cornwell, in trust for the benefit of creditors. The plaintiff obtained a verdict, and the defendant appealed to the general term.

G. W. Bulkley and *A. J. Vanderpoel*, for the appellant.

E. W. and *G. F. Chester*, for the respondents.

By the Court, Mitchell, P. J. The plaintiffs sold goods to the amount of $664.33 to one Cornwell, who purchased them under fraudulent representations which vitiated his title to them. The plaintiff brought an action to recover all the goods, against this defendant, who on the trial admitted that

the goods mentioned in the complaint were received by him. It also appeared that $419 in value of the goods were replevied by the sheriff from the defendant and delivered to the plaintiffs. It resulted that the defendant had appropriated to his own use the goods, amounting in value to the difference between those two sums. When the plaintiff rested the defendant moved for a nonsuit, principally because no demand of the goods had been made by the plaintiff, before action brought. He offered no proof of any title in himself.

In *Storm* v. *Livingston*, (6 *John.* 44,) in trover for a horse, the defendant proved that he had bought him at a constable's sale, and although the ownership was shown to be in the plaintiff, and a demand of the horse had been made of the defendant's wife, yet as none had been made of him, the plaintiff was nonsuited, and the nonsuit was sustained; the court holding that as the defendant came lawfully to the *possession* of the horse by the constable's sale, there was no conversion until a demand; and that a sale by the *defendant after* suit brought, was not such proof of conversion as would enable the plaintiff to recover in that action. Here there was evidence enough of a conversion of the goods not found by the sheriff, to satisfy a jury of such conversion by the defendant, and the motion for a nonsuit was improper; and the defendant did not show that he came to the *possession* lawfully.

In *Tomkins* v. *Haile*, (3 *Wend.* 406,) it being proved that the defendant had ordered the sheriff to levy on and sell the property belonging to the plaintiff, then in possession of a third party, it was held that no demand was necessary before suit brought.

In *Pierce, adm'r*, v. *Van Dyke*, (6 *Hill*, 613,) a promissory note had been taken from the pocket book of the plaintiff's intestate and delivered to the defendant, an attorney. He said he received it for c llection, in which case the court held a demand of him would be necessary before action could be b o ght; but he had no *legal* proof that he had received it

for that purpose, and a nonsuit granted in his favor, was set aside. Bronson, J. delivering the opinion of the court said, "In *Barrett* v. *Warren*, (3 *Hill*, 348,) we held that a demand was necessary before an action could be maintained against one who purchased the goods *bona fide*, or received them as a bailee, without any fault on his part, from a wrongdoer. But it is enough for the plaintiff to show his title and the *original tortious taking*." (That is, a tortious taking by the third party, who took them—not by the defendant, the *bona fide* holder and recipient of them—who is not the original taker in the case supposed.) "The burthen lies on the purchaser or bailee to show that he came to the possession of the property for a lawful purpose and in perfect good faith. If he knew, or had any reason to believe, that he was dealing with one who acquired the property unlawfully, he may then be treated as a wrongdoer, without any demand by the owner. In this case, (if we lay the receipt out of view, as I think we must,) there is nothing to show that the defendant received the note for any lawful purpose. The fact that he is an attorney, standing alone, proves nothing to the purpose. It is the naked case of a man's receiving goods by delivery from a trespasser, without showing why, or to what end, the delivery was made. I think the owner may treat such an one as a wrongdoer, without any prior demand. Trespass or replevin in the *cepit* would lie."

The doctrine here announced is, that if goods be wrongfully taken by one party, the defendant who has since come into possession of them is deemed as much a wrongdoer as the original tortious taker, unless the defendant establish by proof that he came to the possession in good faith, and for a lawful purpose; and that without such proof no demand need be made of him.

The question remains, does this rule apply when the original taking of the goods was by permission of the owner, but who was led to give the permission by such a fraudulent deceit

on the part of the purchaser as avoids the sale, if the seller chooses to avoid it.

In *Hunter* v. *Hudson River Iron and Machine Company*, (20 *Barb.* 501,) the court, speaking of *Root* v. *French*, (13 *Wend.* 570,) says, "it decides that a fraudulent purchase of goods gives no title to the fraudulent purchaser, and that the vendor in such case may maintain replevin for the goods. It then goes further, and affirms the principle that a *bona fide* purchaser from the vendor of goods obtained by fraud, without notice, will under certain circumstances be protected. And to maintain an action against him, a demand in some cases must be made before suit brought. But no such demand is necessary as against the fraudulent vendee." Connecting with this proposition the fact that the defendant holding the goods is deemed a wrongdoer and participates in the wrongful taking until he proves his good faith, he would be entitled to no demand. *Root* v. *French* did not necessarily decide any more than that one who took goods from a fraudulent vendee to indemnify him as an indorser, was not such a *bona fide* purchaser for value as to be preferred to the title of the vendor. Savage, chief justice, says, "If Jenkins [the vendee] procured the goods by fraud, he acquired no right to them as against the plaintiff: a detention of them *after demand* by the plaintiff would be wrongful, and the plaintiff might have regained possession of his goods by the writ of replevin." This may mean only as it is understood in the case above quoted of *Hunter* v. *Hudson River Iron and Machine Company*.

Mowrey v. *Walsh*, (8 *Cowen*, 238,) decided before the revised statutes, which punish the procuring of goods by false pretenses as a felony, held that a *bona fide* purchaser for a new and valuable consideration from a fraudulent vendee, had a superior title to the vendor. In *Voorhees* v. *Earl*, (2 *Hill*, 288,) it was held that a purchaser from one who had fraudulently represented the quality of the article, must rescind *in toto* and offer to return all, or he could not recover the price paid for a part, and was confined to his remedy on the war-

ranty. *Masson* v. *Bovet* (1 *Denio*, 74) is to the same effect, and that the party rescinding must return, or offer to return, what he has received. No point was taken on the trial of this cause that there had been no offer to return the notes of the purchaser. So in *Baker* v. *Robbins*, (2 *Denio*, 136,) it was held that one who has sold goods and taken the note of a *third* person in payment, on a false representation, cannot recover on the original consideration, without first tendering the note thus received by him. In *Matteawan Co.* v. *Bentley, &c.* (20 *Barb.* 641,) the plaintiffs had been led to sell goods to a third party by false representations; but they received part payment in *cash* and the rest in notes of the purchaser. They *never* offered to return the *cash*, and only offered to surrender the notes, at the trial. It was held they could not recover; they could not keep part of the consideration and yet sustain an action founded on a supposed rescission of the whole contract.

In *Barrett* v. *Warren*, (3 *Hill*, 350,) Bronson, J., laid down the rule that a *bona fide* purchaser from a fraudulent vendee could not be liable to the true owner without a demand of the goods, unless he had sold or otherwise converted them. (*Id.* 350, 1.) He says, "A man who *innocently* purchases property, supposing he should acquire a good title, ought not to be subject to an action until he has an opportunity to return the goods to the true owner." In *Ely* v. *Ehle*, (3 *Comst.* 506,) the defendant bought flour of a captain of a canal boat and removed it from the boat: the captain had no authority to sell it. It is there said, that after the original tortious taking was proved, "it *lies on the purchaser* or bailee, in order to protect himself from liability as a trespasser, to show that he came to the possession of the property for a lawful purpose and in perfect good faith, by *delivery* from the wrongdoer. That being proved, and that he had been guilty of no fault, he would be protected against a liability, as a tortious *taker* of the property; although *even in that case* he would be answerable to the owner, for the property in trover or in replevin in the

detinet, after demand and refusal to deliver; for he could not acquire any title to the property by his purchase." (*Id.* 509, 510.) This rule requires demand of the defendant to be proved, only after he has established the fact that he purchased in good faith and for a valuable consideration. The latter was not proved, and so the demand was unnecessary.

Fuller v. *Lewis*, (13 *How.* 220,) was on demurrer. The complaint is not stated in the report; and it is probable that the question of order or burthen of proof was not presented.

The judgment for the plaintiff should be affirmed, with costs.

[New York General Term, December 5, 1857. *Mitchell, Clerke* and *Davies*, Justices.]

Williams, Stevens and Williams *vs.* The Estate of James W. Cameron, a lunatic.

A creditor having a claim against the estate of a lunatic, which is under the care and management of a committee, must apply to the court, by petition, to enforce his claim. He will not be allowed to commence a suit at law against the lunatic, or his estate, without the express direction or sanction of this court.

And even where there appears to be a right of action, yet if no particular advantage will accrue from a suit, the preference will be given to a reference under the control of the court, over an action at law.

Thus where a lunatic purchased property, which he afterwards purposely injured and destroyed, before the same had been paid for, on an application by the vendors, for leave to commence an action against the committee of the lunatic for the damage done by the lunatic, the court denied the application, and referred it to a referee to take proof as to the facts and circumstances, and to report the same to the court, with his opinion thereon.

THIS was an appeal from an order made at a special term, granting to the claimants leave to bring an action against the estate of the lunatic. The facts are stated in the opinion of the court.

A. F. Smith, for the appellants.

D. T. Walden, for the claimants.

By the Court, MITCHELL, P. J. Cameron, a short time before he was declared a lunatic, but while he was a lunatic, went to the store of Williams, Stevens & Willims, to purchase an oval mirror. While there he conversed about the pictures there and bought some, for several hundred dollars. They were sent to his house at Staten Island, and he in the course of the same or the next day, washed out the colors and destroyed the gilding of the frame of one of them, by an alkali. He told the agent of W., S. & W. that he did this to discover if he had been imposed upon, and if the paintings were not water colors instead of oil colors. After that, as the committee of the lunatic say, and as the plaintiffs' agent testified before the referee, but which it is argued is clearly a mistake as to time, W., S. & W., through the same agent, sold to him about $3000 worth more of paintings. These were delivered also, and some of them were also injured by Cameron. As the agent left Staten Island, at the time, he inquired as to the state of mind of Cameron, and his principals were satisfied that he was insane, and had the pictures returned to them. Shortly afterwards Cameron was found to be a lunatic, by an inquisition. A referee was authorized to inquire what claims there was against the estate. Williams, Stevens & Williams presented their claim; it was controverted, and the referee found against them, on the ground that they had reason to believe that Cameron was insane when they allowed the pictures to pass into or remain in his hands, and that it was by their own fault that the damage occurred. It was admitted before the referee that Cameron was a lunatic at, and before, the times of the sales. Notwithstanding this report, Williams, Stevens & Williams applied to the special term for leave to commence an action against the committee of the estate, for the

damages done by the lunatic, and it was granted. The committee appealed to the general term.

Assuming that the decision of the referee is not conclusive, as it was not made under an order to which the petitioners were parties, and that it was intended only for the advice of the court and the protection of the committee, the question arises, what case should the petitioner make, to obtain leave to sue, and whether he should be allowed to sue at law, or only to have a reference, so that the whole matter should be kept under the control of this court.

In the *Matter of Heller*, (3 *Paige*, 199, 201,) the chancellor says: "The statute has given to this court exclusive jurisdiction over the estates of idiots and lunatics, and over the estates of habitual drunkards, except in a few cases, when a concurrent jurisdiction is given to the court of common pleas. If any person has a legal or equitable claim against the estate, which is under the care and management of the committee, who refuses to allow the same, he *must apply to the court*, by petition, to enforce his claim. And he will not be permitted to obtain payment by *means of a suit at law*, except when the suit is brought under the express direction or sanction of this court. Although the lunacy of the defendant may not always form a *legal* defense, this court, upon a proper application by the committee, will restrain such a proceeding and *compel the plaintiff to come here for justice.* 1 *Jac. & Walk. Rep.* 636, 643; 5 *Mad.* 406; 2 *Sch. & Lef.* 229; 1 *Hag.* 98.) And even if a party succeeds in an action at law, it will be a contempt of the court for him to interfere with the property which is under its exclusive control. Although he may afterwards come here for the payment of his claim, he must *again establish it in such manner as the court may think proper to prescribe.*"

This clearly shows that the resort to a court of law would never be authorized by the court, unless it found that that course was necessary, and would be conducive to justice. It would not be allowed, when the defense of the committee or

lunatic might be doubtful at law, but would be recognized in equity. It may be true that a lunatic is responsible at law for his torts. His defense that the plaintiff either carelessly or willfully placed the property in danger, might not be so clear at law as it would be on the application to this court for payment out of a fund under its control. All the minute circumstances of the case could fairly be presented here; a strict legal defense, only, could be presented in the court of law. And when the suit at law was terminated, this court would still allow any inquiry as to circumstances which should reduce, or forbid the payment of, the damages.

There is no advantage, therefore, in allowing an action in this case. Justice will be much better administered by referring the claim to a referee, who shall hear all the circumstances of the case and report them to the court.

If all turned on a question of pure law, or on a few issues of fact, as to which there was contrariety of evidence, and there were no circumstances in the case which might then affect the decision at law, an action might be proper. The same views were expressed by the chancellor again, in the *Matter of Hopper*, (5 *Paige*, 489, 491,) where he says: "The proper course for the party who has a claim against the lunatic, or his estate, is to apply to this court by petition for the payment of the debt, or for leave to bring a suit for the purpose of establishing the claim. And if the chancellor or vice chancellor, by whom the committee was appointed, *is satisfied* the debt is justly due, the committee will be ordered to pay it out of the estate; or, if the claim is doubtful, the court will either have it settled by a reference to a master, or give the claimant permission to establish his claim by a suit at law, or a bill in equity, as may be proper under the particular circumstances of the case."

Here the fact of injury is not disputed. The defense is peculiarly for this court to consider, in what manner and under what knowledge, from which fraud, negligence or carelessness might be imputed to the plaintiffs or their agent, was

the property delivered to the lunatic, and then what amount of damages (if any) the petitioner would be entitled to under all the circumstances.

In *L'Amoureaux* v. *Crosby*, (2 *Paige*, 428,) the chancellor said, "if the claim is disputed or doubtful, it may be referred to a master to ascertain the facts"—"the *chancellor* will see that the legal and equitable rights of the creditors are protected and enforced. But this must be done according to the usual forms of proceeding in this court, or by suits instituted *under its direction.*"

When there is a right of action, the preference is given to a reference under the entire control of the court, over a suit at law. It is not intended, by any thing that has been said, to intimate that there was or was not any fault on the part of Williams, Stevens & Williams; but that question is fairly presented, and can be most properly disposed of on a reference in this proceeding.

It was urged that the order giving leave to commence the action was not appealable. The act of 1854 (*ch.* 270) has made many prior decisions as to what was appealable to the general term quite inapplicable, although it does not affect the right to bring the same matters before the court of appeals. It allows an appeal to the general term from *any order* made at a special term in any *special proceeding.*

The order should be so modified that the petitioners may bring their claim before a referee to be appointed by the court, and that the committee be allowed to prove any circumstances which would show that the petitioners had no right to damages, or which should reduce the amount, or show that they should not be paid such or so great damages out of a fund under the control of this court.

The referee is to report to the court, with his opinion; and to report the evidence, on the request of either party

[New York General Term, December 17, 1857. *Mitchell, Clerke* and *Peabody*, Justices.]

BENOIT JULIEN CAUJOLLE, appellant, *vs.* JOHN P. FERRIE, respondent.

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23a 90

By the common law, to constitute a valid marriage, no ceremony, or solemnization by minister, priest or magistrate is necessary. A marriage is complete when there is a full, free and mutual consent, by parties capable of contracting; even when not followed by cohabitation.

The common law *presumes* marriage; that is, it presumes every man legitimate, until the contrary is shown. And suspicions, or conjectures, or rumors, are not sufficient to rebut this presumption.

The common law will also *infer* a contract of marriage, from circumstances; but not where the impediments of pre-contract, consanguinity, affinity, or corporal or mental incapacity exist.

Although these principles of the common law originated in the canon law, which at one time prevailed throughout christendom, yet in many if not in most of the nations of the continent of Europe, a formal solemnization became necessary, to constitute a valid marriage.

In a country where the law requires the solemnization of a marriage, according to settled forms, in the absence of direct proof of this solemnization, it may be inferred from circumstances, as the common law allows in places where the common law prevails.

This rule is not restricted by any consideration of the place where the contract was made. The *lex loci*, as to the manner in which the contract should be made, will prevail; but the method of determining whether the *lex loci* was complied with, will necessarily be regulated by the *lex fori*.

What evidence is sufficient, in our courts, to authorize them to infer a marriage in conformity with the French law existing at the time when the marriage is alleged to have taken place.

Where the legitimacy of a person is in question, the declarations of his mother are admissible after her death, being connected with a question of pedigree; if not made *post litem motam*.

Where a man and woman, residing in France, publicly avowed their intention to marry, and in consequence of his persisting in that determination the man was compelled to leave his father's house, and the woman her situation as a domestic in another family; and they formally published, as the law directed, their intention to be married at a specific time; which was followed by their living together as man and wife, in a household of their own, the woman bearing the name of the man, and being addressed and spoken of as his wife, by him and their neighbors; by the birth of a child, and the performance of the rite of baptism in the presence of the putative father and members of his family; and the woman repeatedly declared that she had been married to the man, and that she was the mother, and he the father, of the child; *it was held* that the proof was sufficient, after a great lapse of

time, to warrant the court in pronouncing in favor of an actual and sufficient contract of marriage between the parties, previous to the birth of the child, and of the child's legitimacy. MITCHELL, P. J. dissented.

APPEAL from a decision of the surrogate of the county of New York, granting letters of administration to the respondent, John P. Ferrie, upon the estate of Jeanne Du Lux, who died in the city of New York, in November, 1854, intestate. The facts are fully stated in the report of the case before the surrogate, (4 *Brad.* 28,) as well as in the following opinion of Justice CLERKE. They therefore need not be detailed here.

John Jay, for the appellant.

F. Ball, for the respondent.

CLERKE, J. This is an appeal from the decision of the surrogate of the county of New York, decreeing that letters of administration issue to John P. Ferrie, as next of kin to Jeanne Du Lux, a widow, who departed this life in November, 1854, intestate.

The personal estate of the decedent, amassed by her while trading in the city of New York, probably exceeded the sum of $100,000; and as none of her kin resided in New York, the surrogate, in the first instance, granted letters of collection on her estate to the public administrator. On the 11th day of December, 1854, Ferrie filed his petition with the surrogate, praying letters of administration on the estate of the decedent, on the ground that he was her child, and her only child, and consequently, her sole next of kin and heir. This was denied by the public administrator, and by distant relatives of the decedent, named Caujolle, natives and residents of France. The questions involved in the contest were, 1st, whether Ferrie was the son of the decedent, and 2d, if her son, whether he was legitimate.

Jeanne Du Lux was a native of Pau, Province of Bearn, in France, and was born November 24th, 1777. She was the

daughter of John Icard and Magdalene Reviere, who had been previously married to Antoine Dezeille, by whom she had a son, named Benoit. Jeanne and a son, named Paul Alexis, were the fruit of the second marriage. John Icard, Jeanne's father, died in 1785. It is uncertain at what time Jeanne's mother died; but it is probable she survived her husband only a few years. Some years after the decease of her father, Jeanne went to Massat, Castillon, and St. Girons; she also went to Biert, where her mother had resided, and where several of her maternal relatives still resided. In 1797 and 1800 she was employed as a domestic by Anere, a merchant of St. Girons. At this place, previous to the year 1800, she formed an intimacy with Valentin Ferrie, son of Belthazar Ferrie and of Frances Cazes.

Belthazar Ferrie was a tanner, and a resident of St. Girons. When he first heard of the intimacy of his son with Jeanne Icard, he was very much displeased; and, when he found that Valentin declared it was his intention to marry her, he refused to hold any intercourse with him. Valentin soon left his father's house, and he and Jeanne Icard went to live together in a part of a house, belonging to Mr. Benoz at St. Girons, at the entrance of the city. They continued to cohabit together: it does not appear very satisfactorily how long; but during this period, in June, 1800, the respondent was born at this house. Valentin was present at the birth, and acted in the usual way in which any father in lawful wedlock would act on such an occasion. He had the child baptized by the curé of Ledor, as appears from the baptismal records of the church, in which he is stated to be Belthazar Pierre Ferrie, the son of Valentin and of Jane Icard—godfather *Belthazar Ferrie*, and godmother Rose Ferrie. The child (as is very usual in France) was put to nurse with country people, with the concurrence and consent of both parents, who continued to live together in the same intimate relation for some time, but how long it is impossible to infer from the testimony, which is very unsatisfactory on many points, particularly

dates. They must have separated, or discontinued their connection, long before the death of Valentin Ferrie, which occurred probably in 1811. He was killed while conveying goods to the French army in Spain. There is some evidence that both left St. Girons together, and went to Bordeaux; here, some short time previous to 1806, she became acquainted with Henry Du Lux, her future husband, in the house of Mr. Catelan, a silk merchant in that city. In 1806 she and Du Lux arrived in the city of New York, where she continued to reside until her decease in 1854. She engaged in business here, and cohabited with Du Lux until the 17th June, 1812, when they were formally married, in conformity with the French law, at the house of the consul general of France. Du Lux soon after went back to Bordeaux, but returned in 1813. In the summer of 1814 he again went to France. He wrote to his wife from Paris in December, 1814, complaining that she had refused to honor his draft, and stating, in consequence of her unkindness in this respect, that he would not return to New York. From that time nothing positive was heard from him until 1822, when he sent a communication from the Isle of France to Mr. De Guene, of this city. Nothing has been heard of him since that time. From the information furnished by the testimony, relative to the brother and half brother of the decedent, enough appears to warrant the presumption of their death without issue.

When Du Lux went to Bordeaux in 1812, he commenced an inquiry, at the request of the decedent, for the respondent Ferrie; Du Lux did not succeed in obtaining any positive information respecting him; and it was not until 1815, when the decedent visited her native country, that she succeeded in finding him. She placed him in a school in Bordeaux, and proceeded to Paris; a night or two, however, after his arrival, he fled, and returned to the mountains, where he had been brought up. Madame Du Lux returned to New York; but in a short time Ferrie was discovered and taken to St. Girons, his birth-place, and was placed under the care of Mr. Anere,

who promised to take charge of his education. He remained there until 1821, when the decedent, having received no information of him for several years, Mr. Catelan of Bordeaux, employed a traveling agent to make inquiries respecting him at St. Girons. Although Anere had been regularly supplied with funds for his use, the young man was found totally neglected, clothed in rags, and employed as a servant. He was then sent again to Bordeaux, where he remained with Mr. Catelan until 1824; when, principally for the purpose of avoiding the conscription, he was secretly placed on board a vessel bound for America. He lived here some time with Madame Du Lux; but her capricious and violent temper rendered it impossible for him to continue with her; and he at length established himself, as a hair dresser, in Cincinnati. He, subsequently, kept up no regular correspondence with the decedent; but he wrote occasionally to her; and, on several occasions, when he came to New York, he visited her. She was severely injured by coming in contact with a wagon in the street, in 1854, and died in consequence, at the hospital of the Sisters of Mercy, on the 16th November, 1854.

I. I have no doubt that Ferrie was the son, and not the nephew, of the decedent, notwithstanding that in all her correspondence for a number of years, she uniformly referred to him as her nephew. There is no evidence, however, that she had a sister, or that either of her brothers was married, or ever had any children.

The evidence is incontrovertible, on the other hand, that she had *a* son, and that, although she had repeatedly spoken of the respondent as her nephew, she more frequently, in confidential conversations, and, latterly, almost uniformly spoke of him as her son, and in those conversations she discloses one reason why she called him nephew. M. Daguene says that in 1819, when Du Lux had gone away, she told him, "I cannot call him (Ferrie) my son; the fellow looks too old;" and afterwards, "I can't call him my son, he is too old." There is other testimony that this vanity, which lingered in

her to the latest years of her long career, induced her, often, to address him as her nephew; although, at a more early period of her life, she might have been influenced by other motives. In nearly all her intercourse with Ferrie, since his arrival in this country, she treated him, and spoke of him, as *her son*. To some of the witnesses, and particularly to Madame Grieser, she spoke explicitly and specifically on the subject. The witness said to her, "You never got children." She replied, "Oh, yes, you are mistaken. I had one in France when I was very young. I had to send money to support him when he was at nurse." She further said, "I was married in France in the revolution times." And afterwards, to this same witness, during her last illness, she said that she had been married in France in the time of the revolution. To Daguene she said, she was very young when she had the child, speaking of Ferrie. This witness adds, that she spoke of his father, "and I took it for granted, that she was married." To Mrs. Creighton, who had known her 25 years, she said, "she had *one* child when she was quite young; she said she was married very young, and this child born about fifteen"—her predominant vanity prompting her to state, that this event occurred when she was several years younger than when it really occurred. Although speaking of Ferrie afterwards, she spoke of him to this witness as her nephew. To Madame Bamans, who lived some time in the house in William street with her, she said, "she had never had but *one* child, and that was a boy, that she had him in France. She said she left him at a nurse's in France, when she came over." In speaking to Madame Du Fau of Ferrie, as her son, she said, "the father of that young man is dead;" and on this occasion she particularly explained to the witness the manner of his death. Henry Martin testifies that she said when she was very angry, "I should not call him my son, but my nephew," but next day, she would say, "he is my son." "Sometimes, she showed much affection and feeling for him. She would cry, sometimes, and say he ought to come to New York again and

live there, they were so far from each other;" and again, "I was speaking to her of the same accent that she and Ferrie had;" she said, "Oh, yes, we are born in the same province in France!" I said to her, "Oh! he is your son; he has the same voice and expression." She said, "every body says he looks like me; of course he is my son." After a diligent, and, for some time, an ineffectual search for the respondent, when she discovered him in the lower Pyrenees, at the age of nine years, "she told him he was her son." She said "this is my son. I came to fetch him." She took him away with her. The first recollections of Ferrie himself were of living at a place about nine miles of St. Girons; the birth place of the child, born in June, 1800, when she cohabited with Valentin Ferrie.

The respondent testifies that he lived there with country people. The woman who nursed him died while nursing him, and he was recommended to another person in the lower part of the Pyrenees. He always went by the name of Ferrie, on the mountains. She called him by that name when he came to this country. "She said she did not like my father, because he did not see me often enough, while I was at nurse; that he was a rough kind of man, and did not treat her very well. My father's name was Ferrie."

Thus, to various witnesses, and on occasions demanding and eliciting a greater degree of candor and deliberation than she usually exhibited, she not only in general terms declared the respondent to be her son, but specified with some detail the circumstances of his birth, the character and fate of Valentin Ferrie, and her early connection and marriage with him. This is very different from merely *mentioning* him as her son. There is only one instance, I believe, in which she specified any circumstances in speaking of a nephew; and, on that occasion, she did not speak of the respondent as her nephew. This was when she stated to Mary Morrison that she had had a sister in France, who died and left two children, a boy and a girl; that she took the children, and took

the nephew when he was thirteen years of age. "She said the child had died." But no part of the testimony proves that she ever had a sister who arrived at maturity. She only had the brothers whom I have already mentioned. We find, therefore, in referring to the respondent as her nephew, which she undoubtedly did, in a great number of instances, and for a series of years, that she merely *called* him her nephew; while, on the other hand, she not only repeatedly called him her son, but on several occasions accompanied the appellation by a statement of facts; by poignant and unremitting anxiety; by the expenditure of considerable sums of money for his education and support, and by the manifestation of an affection, which, notwithstanding her early neglect of him, and her subsequent violent and capricious conduct towards him, seemed to have partaken, in some degree, of the yearnings of maternal love. Their great resemblance to each other, in voice and visage, may be mentioned as a strong proof of this near relationship. Many of the witnesses were particularly struck with this resemblance; and, although a nephew may possibly bear as strong a resemblance to an aunt, as a son to a mother, this is not generally the case. We find, besides, *that she had no nephew;* and if the respondent was not her son, he must have been only a distant relative, or not related to her at all.

It may be safely assumed, therefore, that the respondent was the son of the decedent and of Valentin Ferrie.

II. Was he their legitimate son? There is, certainly, an absence of direct specific proof of any *solemnization* of a marriage between her and Valentin Ferrie. Is it necessary, however, in order to decide, whether there was a valid marriage, that there was a formal solemnization of it?

The principles of the common law respecting marriage, are few and simple. It requires no ceremony, no solemnization by minister, priest, or magistrate. A marriage is complete when there is a full, free and mutual consent by the parties capable of contracting, even when not followed by cohabitation.

I refer to a few prominent cases in the courts of this state declaring these principles. (*Jackson* v. *Winne*, 7 *Wend.* 47. *Fenton* v. *Reed*, 4 *John.* 52. *The People* v. *Humphrey*, 7 *id.* 314. *Starr* v. *Peck*, 1 *Hill*, 270.) Such was the simplicity of the law throughout christendom on the subject of marriage, that before the time of Pope Innocent the 3d, who died in 1216, there never had been any solemnization of marriage; but the man went to the house inhabited by the woman, and led her away to his own house. This was the only ceremony then used.

The common law also *presumes* marriage; that is, it presumes every man legitimate until the contrary be shown, as it presumes every man innocent and that every man obeys the mandates of the law, and performs his social and official duties, until the contrary be shown. Suspicions, or conjectures, or rumors, will not do to rebut this presumption; however strong the suspicions, specious the conjectures, or loud and general the rumors may be.

The common law, also, will *infer* a contract of marriage from circumstances. This is expressly declared in the cases which I have already quoted. In *Starr* v. *Peck*, (1 *Hill*, 270,) the parents had cohabited for some years, and the father, being a seafaring man, went away. During his absence the child was born; and a few days after his return a marriage was formally solemnized. The parents always treated this child as if she was legitimate. This was held, erroneously I think, sufficient to warrant a jury in finding that a *marriage in fact* existed previous to her birth, notwithstanding the ceremony which took place afterward.

A marriage will not be inferred where there are the impediments of pre-contract, consanguinity, affinity, or corporal or mental incapacity; but these are impediments which render any marriage liable to be declared void by a court of competent jurisdiction.

Thus the common law presumes marriage, and infers marriage from circumstances; but, although these principles of

the common law originated in the canon law, which at one time prevailed throughout christendom, yet we know that in many if not most of the nations of the continent of Europe, a formal solemnization became necessary to constitute a valid marriage.

At the time when the connection between Valentin Ferrie and the decedent subsisted, the law in France, relative to the solemnization of marriages, was very stringent, although, with regard to their dissolution it was exceedingly lax. It was provided that minors could not be married without the consent of their father or mother, &c., and all marriages contracted in defiance of this provision are declared null and of no effect. It abundantly appears from the testimony, that the father of Valentin Ferrie strenuously opposed his intended marriage with the decedent. This opposition was carried so far that Valentin was compelled to leave his house. He also was compelled to abandon his business connection with his father's tan-yard, and went to work with another relative.

The same law, however, in a subsequent section, requires that the *acte* of opposition shall be in writing, signified at the domicil of the parties, and to the public officer, who shall put his seal on the original; and then there must be a judicial adjudication on the validity of the opposition, otherwise the objection has no legal effect. Nothing of this kind is shown; no proof of any of the steps, necessary to a formal opposition, is attempted; the *acte* of opposition, indeed, might have been presented and filed; and so might have been the solemnization of the *acte* of marriage. It would be much safer to presume the latter than the former; because the parties, notwithstanding the paternal remonstrance, changed their habitations, and published their reciprocal engagements and intention to marry, according to the law, on the 20th of the current month, before the proper officer. This was published aloud by word of mouth before the outer and principal door of the municipal hall of St. Girons; and, if any thing is to be presumed, it is to be supposed, if the father persisted in his

opposition, that after this public declaration he would take special care to have his protest regularly recorded, without which it would have no legal efficacy. Valentin and the decedent continued to live together; on the 30th of June, 1800, this child was born; and on the same day he was baptized in the presence of his father; Belthazar Ferrie being his godfather. This was the name of Valentin's father; but whether he relented sufficiently to consent to be the godfather of this grandchild, is not shown, otherwise than that his name is inserted in the record; and it does not appear that any other person of that name, of sufficient age, was at that time in existence. No legal opposition of the father having been established, we next arrive at the inquiry, whether in a country where the law requires the solemnization of a marriage, according to settled forms, in the absence of direct proof of this solemnization, it can be inferred from circumstances, as the common law allows in places where the common law prevails. This rule, I think, is not restricted by any consideration of the place where the contract was made. The *lex loci*, as to the manner in which the contract should be made, will undoubtedly prevail; but the method of determining whether the *lex loci* was complied with, will necessarily be regulated by the *lex fori*. In other words, the rule of evidence will be governed by the *lex fori*. And as we have seen, no proof in our courts of an actual marriage is, ordinarily, necessary. This is solely required in prosecutions for bigamy, and in actions for criminal conversation. Is there, then, evidence sufficient, in the present case, to infer a marriage in conformity with the French law existing at the time?

We are not without positive evidence on this subject. The declarations of the decedent herself are admissible, being connected with a question of pedigree, and not being made *post litem motam*. No controversy on the subject had been commenced when she made the declarations, and she unequivocally declared to Madame Grieser, and other witnesses, that she had been married in her youth, in France, in the revolutionary times, and that she had had a child in France, when she was

very young. *Is there any thing in the testimony fatally irreconcilable with this declaration?* Although the impression which she made in those early days upon the heart of Valentin Ferrie was not very deep, as subsequent events proved, yet he was evidently at the time greatly attached to her; for her he forfeited the regard of his father, relinquished his place in his father's household, and was compelled to seek the means of support from a distant relative. At the same time, she left her employment as a domestic, and he the home of his youth; and they became united in a household of their own. His father's opposition was not founded upon any defects in her character or moral principles; but the objection was placed on the ground that she was in an inferior station of life. The Ferries were substantial trades people, she a poor domestic. Still Valentin openly lived with her, in the same town with his family, precisely as any man would live with his wife; and in the way in which a young man, swayed by an overpowering sentiment, would live, fearing the displeasure of his father, and at the same time incapable of abandoning the object of his affection. They lived together at Benoz's, which was a reputable place. She was there called by the name of Ferrie; Valentin spoke of her by the name of Ferrie; he was present at the *accouchment;* he presented the child at the baptismal font; they both went to see him at nurse; the people of the quarter in which she lived called her Madame Ferrie; she was called Madame Ferrie by Madame and Mr. Anere, in whose employment she was when she attracted the notice of Valentin; Madame Anere manifested a great interest in her, and sent her things during her confinement. The witnesses, who speak of her as they knew her at this early period at St. Girons, know nothing against her reputation. She had no intercourse or intimacy with any other man than Valentin Ferrie. No circumstances are disclosed in the testimony to show that the relation subsisting between them was in any respect different from that of young married people, except the want of direct proof of a regular solemnization of marriage; and it is evi-

dent that this was at least *intended*, from the fact that Valentin was compelled to abandon his father's house, because he persisted in declaring his determination to consummate his avowed intended marriage with Jane Icard; because they adopted a course of life in conformity with that intention; and because they formally published, as the law directed, their intention to be married at a specific time, previous to the birth of their child; and immediately after the birth of the child the rite of baptism was performed in the presence of the father; and if his grandfather was not the godfather, some other relative of the same name was. Indeed, according to the usage that prevailed universally throughout christendom, before the thirteenth century of the Christian era, their marriage was complete when they went to keep house at Benoz's. Their avowed intention to marry, consummated by their setting up a household and living together in fulfillment of that intention, would alone have perfected their espousals, without any further external act. Now, if our law allows us to infer a marriage from circumstances, why may not a marriage be inferred from the circumstances connected with this case. In one case, as we have seen, the parties had lived together for some time; a child was born; the father went away to sea; he returned, and some time after the birth of the child, a marriage was solemnized. It was held that the circumstances warranted a jury in finding a marriage of fact, *previous* to the solemnization. This opinion could not have been founded upon the circumstance that the parties continued to live together, and recognized the child as legitimate, *after* the solemnization. The fact of a previous marriage contract could be inferred only from the declared intention to marry, and from their actual cohabitation, with a view of fulfilling that intention. The conduct of the parties, subsequently to the solemnization of the marriage, can be accounted for only by reference to that event. This subsequent conduct cannot fairly be employed to prove an actual previous contract of marriage; but, on the other hand, the solemnization of marriage rather repels

the presumption of a previous valid marriage of any description. The circumstances in the case before us, showing the relation between the parties at this period, their courtship while Jeanne was at service, their intention to be married, Valentin's persistence in that intent, the consequent indignation of his father, their actual cohabitation in the manner in which they would have cohabited if they had been married, are all affirmative and primary; while the evidence in contravention of the marriage consists of rumors, reports, suspicions, which are all consistent with a formal marriage; direct proof of the solemnization of which at St. Girons might have been lost, or the parties might have solemnized their contract before the curé of some other place or parish, in order to avoid any open exhibition of the displeasure or opposition of Valentin's father. To employ the language of the court in *Starr* v. *Peck*, "the case bears no feature of heartless prostitution. The proofs are plain, that the object of both parties was marriage." But to these circumstances may be added the declaration of the decedent, namely, that she had been married at this period, which, as we have seen, is legal evidence in favor of this respondent; and the fact that she was not formally married to Du Lux, until after the death of Valentin Ferrie, seems to corroborate the truth of this declaration.

Even if there were no regular solemnization in the precise manner directed by the French law, at that time, would their marriage contract be absolutely void? Now, only marriages contracted against the provisions of the articles in section 1, tit. 4, are declared "null and of no effect;" and those articles relate only to the opposition of relatives, to cases where there is a pre-contract, to marriages between relatives within a certain degree, and where the parties are incapable of consent; the same grounds, with the exception of the opposition of relatives, as would controvert the presumption of marriage according to the common law. With regard to the opposition of relatives, we have seen that it was never legally established. The manner of the celebration, then, according to the law

of France at the time, may be deemed only directory. The absence of the solemnization prescribed, did not make the marriage necessarily void.

On the whole, notwithstanding many difficulties in this case, notwithstanding much that is inexplicable and strange in the conduct of the decedent, and notwithstanding the want of that completeness of proof necessary to give full assurance to my convictions, I am of opinion that we are warranted from the circumstances, to pronounce in favor of an actual and sufficient contract of marriage between Valentin Ferrie and Jane Icard.

When to the inference from circumstances, and the declarations of the decedent, we add the presumption that the law invariably entertains in favor of marriage, the difficulty is considerably diminished. In the language of the decision from which I have already quoted, "we are to presume against a notorious act of immorality, almost as strongly as we would against the commission of a legal crime." And this may be a rational and true presumption even in France; for, although illicit cohabitation may be more common, and less disreputable in that country than in this, yet there is a disgrace attending it in all Christian lands, which must be repugnant, if not revolting, to every person not entirely lost to shame—to every person, especially to every woman, who possesses the smallest measure of self respect, or who in any degree cherishes that sentiment, which seems to be as deeply seated as any of the parental emotions—the desire to transmit to one's offspring an untarnished name. Unhappily, in all countries we have too many instances of this indifference to character, and this disregard for family honor; but, are we to presume it? Are we to establish it as a fact without evidence, and strong evidence? There is no reason, inevitably necessitating the presumption of illegal cohabitation in this particular case. Whatever might have been the conduct of the decedent in the subsequent part of her career, I think the evidence is sufficient to show that her conduct was correct at this early period, at Biert, Massat and St. Girons. There is

some evidence, indeed, which speaks lightly of her at this time; but it has plainly no foundation in the facts stated. The evidence in favor of her reputation, on the other hand, is decisive and direct. The witnesses who knew her at St. Girons concur in saying that her conduct there was that of a modest girl; and there is not a single word to show that Valentin Ferrie was a person of licentious morals. On the contrary, Daffis, his intimate friend, says, that he was "a respectable young man, industrious, and a good worker." "I never knew that he had any children or intimate relation with any other woman than Jane Icard." "Jeanne had no relation with any other man than Valentin Ferrie. I never heard any thing against her reputation with reference to other men here."

There is nothing disclosed in the testimony to show that her character was such as to warrant the belief that she would have consented to form an illicit and temporary connection with Valentin Ferrie, without, at least, the promise of a marriage; and every thing in his conduct shows that such an event was contemplated by him; for it is on this precise ground, as I have said, he defied the opposition, and disregarded the remonstrances of his father. This was his intention avowed to his family before he lived with her. Having, *pursuant to this intention*, left his father's house, and abandoned his business, why should we presume the absence of a marriage contract during the period they lived together, particularly when we find their language and behavior towards each other were such as usually indicate the relation of husband and wife? But, it is said that a marriage will not be presumed, where the connection was, in the first instance, illicit. This is, perhaps, as a general rule, safe, although it may be doubted whether even as a rule it has been generally acquiesced in. But, it is clearly not the rule when the connection, as in this case, has been formed pursuant to an actual promise to marry, and an intention to marry, repeatedly and publicly announced. There was a promise to marry, followed by a declaration to relatives and friends of an intention to fulfill the promise, and by a

public announcement that it would be consummated by a regular solemnization, as prescribed by law.

Whatever may be the conclusion at which an unbiased mind may arrive, after a careful examination of the testimony in this case, it cannot, as I have intimated, be unaccompanied with doubt. But, I think, much of this difficulty may be explained by giving due consideration to the mental and moral peculiarities of the decedent.

She presented a remarkable example of caprice, inconstancy, and irascibility. And yet she exhibited industry and application. But she was unstable in every thing, except her vanity and her love of money. If the respondent was indeed her son, why did she so repeatedly, for a great number of years, call him her nephew? and on the other hand, if he was indeed her nephew, why did she so persistently call him her son? At a very advanced period of her life, she had a horror of looking old, and of being thought old. Perhaps she was not singular in this; but, it certainly is unusual for a mother, or an aunt, to look with repugnance, or hate, on her son or nephew, for fear that the comparison between them would make her appear old. After a long interval of separation, and after manifesting a great desire that this respondent should be restored to her, she treated him in the most insulting manner, and compelled him to leave her house. At one time she expressed a great desire that he should have her whole property; at another time, that it should be given for public charity. Her temper was extremely violent, and she was continually engaged in quarrels. Possessing a fortune of over $100,000, she lived alone, in the garret of her house, in William street; and no doubt she would have been much better provided with the comforts of life, were she the inmate of an alms-house. Sometimes very agreeable; sometimes exceedingly disagreeable; now bland and affable; in an instant, without any apparent provocation, rude and insolent Like the character in Martial's celebrated epigram, she was at once "touchy, testy, and pleasant." (*Difficilis, facilis, ju-*

cundus, acerbus es idem.) These peculiarities of temper may, in some measure, account for the circumstance in her history, which casts the greatest doubt on the nature of her connection with Valentin Ferrie. I mean her early separation from him. After a comparatively brief period she abandoned him, or he abandoned her; they parted, and never afterwards, to the period of his death, in 1811, does she appear to have evinced any wish to be restored to him. And she exhibited the same indifference towards Du Lux, after his final separation from her. She was evidently incapable of a profound or durable sentiment for any one; and, I think, it is more rational to impute the early dissolution of her connection with Ferrie to these defects of character, than to the want of a contract of marriage between them.

I had proceeded thus far in my inquiries, before I perused the final opinion of the surrogate. We have arrived at the same conclusions, by a course, in some respects, different. With his usual care and discrimination he has fortified his position with the sanction of authority, from French and English jurisprudence; while I have trusted, principally, to fundamental principles, derived from natural and positive law. I have little hesitation in thinking, that the result is authorized by sound considerations of policy and practicability—considerations, to which, in questions of doubtful import, our law very commonly has recourse. If positive proof of a conventional marriage were required in every case, there are few people who would not be exposed to the imputation of illegitimacy. This would be still more frequently the result, where the marriage of a contestant's progenitors occurred at a remote period, in a distant country, or, like the principal events of this case, at an epoch of social commotion and fierce political strife.

In conclusion, to recapitulate, I do not entertain the least doubt, that the respondent was the son of the decedent, and of Valentin Ferrie. I infer from the proof and the circumstances of the case, that a contract of marriage was entered

into between the decedent and Ferrie, which was consummated before or during the time they took up their abode, and lived together as man and wife, at the house of Benoz, at St. Girons; that even if the inference was not warranted by the circumstances, and by the positive declarations of the decedent, made at a time when she had no legal interest, or indeed no apparent motive of any kind, to utter a falsehood, or to refer to the subject, yet the presumption of law, in the absence of the canonical and other legal impediments of pre-contract, consanguinity, or affinity, &c., is so unreserved and emphatic that, on this ground alone, the decision of the surrogate may be safely sustained. I think that the evidence of the appellants is entirely devoid of that countervailing force which the law requires, to rebut its benign presumption in favor of marriage.

The proceedings before the surrogate should be affirmed with costs.

PEABODY, J. concurred.

MITCHELL, P. J. I dissent, principally, on the question of fact. The conduct of father and mother, to the child, was not such as would be exhibited to a lawful child; they both deserted him before he was four years old, and the mother never inquired for him until he was nearly twelve years old, and then, after she found him, let him (when he fled from her) remain without notice, until a miscarriage led her to seek him again. The father did not die until 1812, yet by 1804 she had formed a liason with Du Lux, which was continued until 1813, when she married merely to conform to the usages of this country. In all her correspondence before her marriage to Du Lux, she was described by her maiden name; she was so described in the various preliminaries to that marriage, and even when she stood at the altar before the priest of her religion at the ceremony of marriage, which is deemed a sacrament, in her church.

She never allowed Ferrie, the applicant, in his correspondence, to call her mother. He never did it; and when a friend

writing for him in his name called her so, he received a scorching rebuke. She distinguished him by a name by which illegitimate sons are said to be recognized among certain classes—"nephew." She never showed a mother's love to him; nor a wife's devotion to his father. Unlike the case of *Starr* v. *Peck*, (1 *Hill*, 270,) the mother and father did not live together until death separated them. They parted when the fervor of passion had subsided. They did not bring up the child as legitimate; but each left him as an outcast—literally as *nullius filius*—until a sense of duty compelling the mother to look after him, she doled out a little of her money, but none of her affection, upon him. All the *seeming* inconsistencies of her conduct are explained, and are consistent, on the supposition that she knew that the sight of the applicant Ferrie was a cause of shame to her, and revived the recollection of his unlawful birth; that the name of *son*, as applied to him, was a dishonor and a disgrace to her. If she were married to Vallentin Ferrie, her life was a life of falsehoods; if she were not, it is all consistent. Even the applicant, in his petition, could not venture to call himself her son, but her son or nephew.

Although it is not necessary for a *child* to produce the *acte* of marriage to prove his legitimacy, yet the absence of that record in a country where it is absolutely indispensable as between husband and wife, and where it is required by law, and is the custom of the people, is strong evidence that there was no marriage; and is only to be rebutted by strong proof. The clearly established illicit connection between the father and mother for over seven months before the birth of the child, is a strong legal presumption that their subsequent intercourse was of the same character.

If the mother is to be believed, she had a child—a son—when she was but 15 years old, and that child died. If the child died or was born when she was near that age, it was not this applicant, for he was born when his mother was 23 years of age. This would show (as the intimate companion and *confidante* of her youth said of her at that period, and that she

knew it from her statements,) that years before she knew Valentin Ferrie, her conduct had been loose and gallant; and this also is consistent with her subsequent life; a woman of 22 years of age enticing a lad of 17, (as Valentin Ferrie must have been at the beginning of their intercourse,) cohabiting with him without any marriage, certainly until about a month before the child was born—then continuing with him, so far as the proofs show, only about two months after the birth—abandoning father and child within four years after the child was born, and forming a criminal connection with another, and continuing that connection until the remonstrances of others led her to marry the new lover. These facts overbalance all those in her favor; and others might be added. The father too—a worthy and industrious man, as he was esteemed, and living near the home of the child—neglected him to the day of his own death, from some short period after his birth.

Decree of surrogate affirmed.

[New York General Term, December 15, 1857. *Mitchell, Clerke* and *Peabody*, Justices.]

Marsh *vs.* Lowry and others.

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It is no objection to the regularity of the proceedings in a foreclosure suit, that the place of trial was in a county other than that in which the mortgaged premises are situated; where there has been no motion or demand made to change the place first selected, and a consent to the change, or an order of the court to that effect.

In such a case, after judgment, and a sale of part of the property, a purchaser cannot raise the objection that the action was not tried in the county where the mortgaged premises are situated.

MOTION to set aside a sale of mortgaged premises, made under a decree of foreclosure.

Van Buren & Robinson, for the plaintiff.

F. G. Luckey, for the defendants.

By the Court, MITCHELL, P. J. The action is for the foreclosure of a mortgage on lands in Westchester county. The place of trial indicated by the complaint and subsequent proceedings is the city of New York. After judgment and a sale of part of the property, it is objected that the place of trial should have been in Westchester county. The code declares that actions must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial, among other things, when the action is for the foreclosure of a mortgage on real property. (§ 123.) But it is equally explicit that if the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein, *unless* the defendant, before the time for answering expire, demand in writing that the trial be had in the proper county, AND the place of trial be thereupon *changed by consent* of parties or by *order* of the court, as provided in this section. (§ 126.) This section does expressly authorize the *court* to change the place of trial, when the county designated for that purpose in the complaint is not the proper county. Thus a demand to change the place of trial, and an order of the court thereon, are essential to change the place of trial even in local causes of action, and where the complaint does not state the proper county. The last section places the application to change the place of trial, because the cause of action is local, on the same footing, in one respect, as when the motion is founded on the convenience of witnesses: in both cases there must be a demand or motion to change it; and in both there must be a consent to the change, or an order of the court. The proceedings are regular in the county first selected, unless the consent to change be given, or an order of the court be made, to that effect.

The application was also made to set aside the sale, on the ground that the property was sold much below its value. On notice to the various purchasers none object but one. The defendants' affidavits tend to show that the property sold for

one-fifth of its value. The purchaser who objects admits that what he bought sold for less than half its value. The sale was advertised for one day and postponed to another by the plaintiff, on account of the extremely low prices at which sales were made. The motion to rescind the sales as to those who do not oppose must be granted, as by default. As to the other purchaser he does not strenuously oppose, but he should receive a fair indemnity, for his costs and counsel fees; something for the loss of a bargain. Let him be paid $250 to cover all his losses and in lieu of the gain which he might have made. And let the property be readvertised: the defendants also first paying to the plaintiff $10, the costs of this motion, and all the costs on the former advertisements and sales.

[New York General Term, December 27, 1857. *Mitchell*, *Clerke* and *Davies*, Justices.]

Duncan and others *vs.* Ainslie and Hicks.

Where a defendant by his answer admits a part of the plaintiff's claim to be just, the court may on motion, under sub. 5 of sec. 244 of the code as amended in 1857, direct judgment to be given for the plaintiff for the amount of the claim admitted to be just, without prejudice to his right to proceed in the suit, for the balance claimed by him.

COMPLAINT filed to recover $1366.45, the amount of a promissory note made by the defendant Ainslie, payable to the order of, and indorsed by, the defendant Hicks. The defendant Hicks claimed a payment on the note of $145.22. The defendant Ainslie made the same claim in his answer, and as to the balance of the plaintiffs' claim neither of the defendants denied the same to be just. At a special term an order was made for judgment for the plaintiffs, for the balance of their claim, after deducting the payment of the said sum of $145.22, and judgment was rendered therefor for the plaintiffs,

under section 244 of the code, without prejudice to the right of the plaintiffs to proceed in the suit for the balance claimed by them.

From this order an appeal was taken by the defendants.

Dean & Townsend, for the appellants.

H. W. Robinson, for the respondents.

By the Court, DAVIES, J. The last clause of the fifth subdivision of the 244th section of the code was amended at the last session of the legislature, so as to read: "When the answer of the defendant, expressly, or by not denying, admits part of the plaintiff's claim to be just, the court on motion may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy." The amendments made at the last session were, by inserting after the word "defendant," the words "expressly or by not denying," and after the words "enforces a," the word "judgment." Previous to this amendment it was doubted whether or not in all cases, where the defendant admitted part of the plaintiff's claim to be just, the court might not enforce the payment of that portion of his claim thus admitted, as it enforces a provisional remedy, that is, by commitment as for a contempt. This point was fully considered by Justice Clerke, in the case of *Lane* v. *Losee*, (11 *How.* 360,) and we entirely agree with him, that the legislature could never have intended that where, in an action on contract in which the defendant was not liable to arrest, he admitted part of the plaintiff's claim to be just, for such part so admitted payment could be enforced as for a contempt. If the plaintiff recovered the residue of his claim, confessedly he could not imprison the defendant on the execution to be issued thereon. It was well held in that case that the legislature could never have intended to enforce payment of the part of the claim which was admitted, by the summary process of commitment for a contempt, when, as to the

residue, the defendant would not be liable to imprisonment on the excution issued on the judgment. This would be punishing the defendant most seriously for his honesty in admitting what was just, and holding out a great temptation to litigate and deny just claims. But we think, to obviate all such doubts, the legislature have properly amended this subdivision, by saying how the court may enforce the order, viz. as it enforces a judgment or provisional remedy. In this case the court have sought to enforce the payment of that part of the claim admitted to be just, by way of judgment. That was what the plaintiffs were entitled to, on the admission of the defendants. If they had not answered at all, the plaintiffs would have had judgment for the whole amount of their claim. The defendants having admitted part of it to be just, they take judgment for the part so admitted, in the same manner as though they had had judgment for the whole of their claim.

We do not doubt that, in proper actions, the legislature have given to this court the power, when part of the plaintiff's claim is admitted, to enforce satisfaction, if it be in the case of a provisional remedy. Such cases frequently arise, and the ends of justice imperatively require that such power should be vested in this court.

We think the order appealed from was correct, and the same should be affirmed with costs.

[New York General Term, December 21, 1857. *Mitchell*, *Clerke* and *Davies*, Justices.]

J. S. Abbott and E. A. Abbott *vs.* Wm. H. Aspinwall.

One who is a subscriber to the capital stock of a corporation, and has appeared as such on its books, and has attended meetings of the stockholders and acted as one of them, cannot, when sued as a stockholder, for a debt due from the company, defend himself on the ground that although the company has been in operation for more than a year, ten per cent of the capital stock has never been paid in.

The statute makes each stockholder liable for the debts of the company, in his individual capacity, severally, and not jointly with the others. It is not necessary, therefore, to make all the stockholders defendants to an action by a creditor of the corporation. Each creditor has a remedy against each stockholder.

The remedy is not against such stockholders, only, as have not paid for their stock; but it is against "stockholders," without any such restriction. The stock *held* gives the measure of the recovery; not the amount of stock unpaid for.

APPEAL from a judgment entered at a special term. The action was brought by the plaintiffs, creditors of the "Mexican Ocean Mail and Inland Company," against the defendant, a stockholder of the company, to recover the amount of their claim. This company is a corporation organized under an act of the legislature of the state of New York, passed April 12, 1852. (*See Laws of* 1852, *p.* 302, *and the amendments thereto; Laws of* 1853, *pp.* 202, 1138.) The capital of the company was divided into fifteen thousand shares of $100 each. The company was organized and went into operation in January, 1853; their principal office being in the city of New York. The defendant became a stockholder and owner of 250 shares of the stock of the corporation on the 28th of March, 1853, and has always continued such stockholder, and participated in the management of its affairs. In May, 1853, the company gave the plaintiffs an order to make for them wagons and vehicles for their mail and passenger service; they were made, and delivered to the company during the summer and fall of 1853, and were forwarded by them to Mexico for the company's use. For the payment of these wagons the company made and delivered to the plaintiffs their two promissory notes, amounting to $4554.82. The notes

were not paid. The company also were indebted to the plaintiffs in the sum of $420 for work, labor and services performed, and in $34.30 for freight and carting paid. The plaintiffs obtained a judgment against the company upon these notes and indebtedness, on the 7th of July, 1854, and issued an execution thereon, which was returned unsatisfied. Issue was joined in this action by the answer of the defendant, on the 24th of November, 1854. The action, by an order of the court, was referred. The referee reported, that the plaintiffs were entitled to recover from the defendant the amount of the notes and indebtedness. Upon the argument of the case before the referee, the defendant sought to avoid his liability upon the ground that the 10 per cent mentioned in the second section of the act of April, 1852, had never in fact been paid in, and that, therefore, the company was not legally incorporated. Upon the trial, Robert G. Rankin, the president, was examined as a witness, who swore the 10 per cent was paid in. The referee reported, however, as a matter of fact, that it was not paid in; but he further reported, "that, as matter of law, the omission to pay in 10 per cent of the capital stock is not a defense to the defendant in the action, against the claim of the plaintiff." The referee also reported, as matter of fact, that the defendant on the 28th of March, 1853, became the owner of 250 shares of the stock of the company, and continued to be a stockholder and the owner of said 250 shares during the period when the above named liabilities and indebtedness in favor of the plaintiffs were contracted and accrued; and, as such stockholder, had taken part in the management of the company. The evidence on this point being, that he was surety to the United States government for the company on its mail contracts; that he was interested in contracts with the company for its sea service; that he had attended meetings of the stockholders as late as May, 1854; that in the spring of 1854 he purchased additional stock when aware of the plaintiffs' claim, purchasing this stock directly from the company, and

to raise a fund to pay its debts, one of which was in judgment against the company; that in the spring of 1854 he was the principal actor at a meeting for the election of directors, and made suggestions for the disposal of its reserved stock and mail pay.

The defendant appealed to the general term.

H. C. Van Vorst, for the plaintiffs.

Varnum & Turney and *Wm. M. Evarts*, for the defendant.

By the Court, MITCHELL, P. J. The defendant is sued as a stockholder of the American Ocean Mail and Inland Company, for a debt due by the company. The only questions raised by the defendant's points are, 1st. Whether the defendant can be liable as a stockholder, if ten per cent of the capital stock had never been paid in; 2d. Whether he can be liable, he having once paid to the company (not to a creditor) the amount of his subscription in full, while other stockholders who have not paid in full are not sued; and 3d. Whether it was necessary to make all the stockholders parties to the action.

The company (if incorporated) was incorporated under the act of 1852, chapter 228. They filed in the proper offices the certificates required by the act. They went through the form of receiving from one Ramsay, as a subscriber, $1,400,000 in gold at one of the banks in this city; about $80,000 in gold being brought from the vaults of the bank and placed on its counter, and then delivered by Ramsay to an officer of the company, the company delivering it back to Ramsay in payment by the company for rights transferred by him to it, estimated at the total amount of his subscription, and then Ramsay delivered the $80,000 back to the bank. Such a contrivance may not have protected the company from the annulling of the franchise assumed by it, in a proceeding instituted for this purpose by the state. But neither the company nor Ramsay could ever set up that the payment was not made in

full, both for the rights transferred by him and for his subscription, when the arrangement between them was contrived for the very purpose of complying or appearing to comply with the law. As between them it was a good payment, and far exceeding ten per cent on the whole capital. So also it would affect all stockholders, who were not in some way defrauded by the contrivance. The defendant gave no proof that such was the case with him. He became a stockholder after this nominal payment was made, and acted at a meeting of stockholders where the president of the company read its minutes, from its commencement to the day of the meeting, and explained its position. From this he must probably have known the nature of the payment made by Ramsay, and yet he continued to act as a stockholder.

If we are to assume (as the referee finds) that the ten per cent was not paid, then the defendant must maintain the position that one who is a subscriber to the stock of a company, and has appeared as such on its books, (and has acted as a stockholder,) cannot be liable to creditors, if he can show that the company has not received ten per cent of its capital from its subscribers, although the company has been in operation (as this company was) for more than a year.

The act of 1852 authorizes "any seven or more persons who may desire to form a company" for these purposes, to make, sign, acknowledge and file a certificate, stating among other things "the specific objects for which the company shall be formed," and then declares (§ 2) that "*when* the certificate shall have been filed as aforesaid, and ten per cent of the capital named paid in, the persons, &c. shall be a body politic and corporate." The effect of this section is that when its two requirements are complied with, the certificate duly made and filed, and the ten per cent paid in, the associates become a body corporate, even as against the people, and are entitled to, and possessed of, the franchise of a corporation, as effectually as if it had been a grant from the state; and that on *quo warranto* by the state, they could set up and sustain their title.

It in no way alters the law as to the inability of third persons, in certain cases, to sustain the denial of the existence of a corporation. If this corporation had continued for ten or more years, and had during all that time exercised its franchise, and then it had been discovered that the certificate was not in due form, or had not been duly acknowledged, the state could raise the objection; but neither the company, nor its stockholders, nor its debtors, could do so. The limitation in section 2 was made for the benefit of the state, not for the company or its stockholders. A different construction would defeat one great object of the act, which was to make "such persons as *appear* by the books of the corporation or *association* to be" stockholders liable to the creditors of the association. (*See section* 9.) The expression "or association" may have been introduced to avoid the difficulty now raised; but whether it was so or not, the clause quoted holds out to creditors that all which they have to look to, in order to ascertain who are liable, is the books of the association, and warns the stockholder that when he allows his name to be placed on their books, he assumes a liability to the creditors of the company.

The general rule also has been that a person dealing with a company which is in the user of its franchise cannot set up that it has no corporate existence, either in consequence of acts which would cause a forfeiture of its charter, or of the omission of acts which should have been performed before it could acquire a perfect title as against the state. In *McFarlan* v. *The Triton Ins. Company*, (4 *Denio*, 392,) McFarlan had given his bond to the company, and being sued on it, offered to prove under the plea of *nul tiel corporation*, that the subscriptions to the capital stock were not taken in accordance with the act; that no money was paid to the commissioners by the subscribers, but that the commissioners gave credit. The company commenced its business and continued it for two years. There was evidence that the whole of the stock was *taken* before the company was organized, but the report seems to imply that it was not paid for. Under the act, the

company was not to commence business until the whole of the capital stock had been *paid*, or secured to be *paid*, and a deposition to that effect made and filed. Bronson, Ch. J., said: "Upon such proof there could be no doubt but that the plaintiffs were a corporation, so far as third persons are concerned. It would have been enough for the plaintiffs to show the charter, and the user under it. It is unnecessary to inquire what may be the rights of the people in relation to this corporation, or as against the individuals who were concerned in getting it up and setting it in motion. The defendant does not represent the sovereign power, and has nothing to do with the question whether the company should be dissolved. So long as the state does not interfere, the company may sue or do any other lawful act, whatever sins may have been committed *in bringing the body into existence.*" The doctrine of *Corning* v. *McCullough*, (1 *Comst.* 47,) is that the stockholders in these cases are liable, not under the statute, but primarily as partners, with a protection against being sued until execution is returned unsatisfied against the company. That would make it quite immaterial whether the company were duly incorporated or not; the statute only operating to enable *each* creditor to sue *each* stockholder to the extent of his stock, instead of suing all together.

The 6th section of the act recites that the stockholders shall be *severally individually* liable to the creditors of the corporation, to an amount equal to the amount of stock *held* by them respectively, for all debts and contracts made by such corporation, until the amount of its capital stock shall have been paid in and a certificate made and recorded. This makes each stockholder liable for the debts of the company in his individual capacity, severally, and not jointly with the others. It is not necessary, therefore, to join the other stockholders as defendants. The object is not to compel a *pro rata* contribution. To do that, not only all solvent stockholders would be necessary defendants, but all the creditors of the company would be necessary plaintiffs. Instead of that, each creditor

has a remedy against each stockholder. In fact, as each stockholder is made "severally" liable, it does not appear that an action could be sustained against more than one, unless on behalf of all the creditors against all the stockholders, not under the act but for the purposes of equitable contribution.

The remedy is not against such stockholders as have not paid for the stock, but is against "stockholders," without any such restriction. It is not to the extent of their unpaid subscriptions, but "to an amount equal to the amount of stock *held* by them respectively." "The stock *held*" gives the measure of the recovery, not the stock unpaid. As each is liable to the extent of the stock held by him, and this amount would vary with different persons, it also shows that the action was not to be joint but several.

The judgment for the plaintiff for the debt demanded, which was less than the stock held by the defendant, should be affirmed with costs.

[New York General Term, December 21, 1857. *Mitchell*, *Clerke* and *Davies*, Justices.]

26 208
36 323

Berrien *vs.* Wright and Dardin.

Where a negotiation for the sale and purchase of lands in Florida was made in that state, but the final agreement, and the notes given for the purchase money, were executed in the state of New York, the notes being payable in Florida; *Held* that the notes were not void for usury, although interest at the rate of eight per cent was reserved.

When a personal contract by its terms is to be performed in another state, and the place of its performance is not chosen with any intention to evade our laws, but because that place best suits the honest intentions of the parties, our usury laws do not apply to it, although it be made and executed here.

Under the statute of limitations, as re-enacted in the code, where a right of action had accrued previous to the code, and the debtor, after the debt became due, departed from the state, and resided out of it, for different periods during a series of years, the successive absences are to be aggregated, in computing the time for the purpose of ascertaining whether the demand is

barred by the statute. The statute is not confined to the first absence after the cause of action accrues.

If the debtor has not been a resident of, or present in, the state of New York for the term of six years in the aggregate since the maturity of the indebtedness and before the commencement of the action, the statute is not a bar.

The time during which a plaintiff has been restrained by an injunction, from commencing an action, is not to be reckoned; although he has not pleaded that the injunction was served on him. It is sufficient if he had notice of it.

APPEAL by the defendant Wright, from a judgment entered upon the verdict of a jury. The action was brought by the plaintiff as indorsee of the following promissory note:

"*Apalachicola, Oct.* 11, 1841.

On the first of May, 1844, we promise to pay to Lewis Curtis and George Griswold, trustees of the Apalachicola Land Company, or their successors or order, in the city of Apalachicola, eight hundred dollars with interest from date, at and after the rate of eight per cent per annum, for value received.

HENRY M. DARDIN,
ISAAC M. WRIGHT."

Indorsed—"Without recourse. Lewis Curtis, George Griswold, trustees."

The note was one of five for $800 each, the last executed by defendants, as the consideration for a wharf lot in the city of Apalachicola, purchased for the sum of $4000, under a contract between Joseph Delafield, the agent of said company, and the defendants. It was transferred to the plaintiff in payment of a previous debt due him by the company, for professional services.

The plaintiff had a verdict for the amount of the note, with interest, for which sum, with costs, judgment was rendered.

R. S. Emmet and *A. L. Robertson*, for the appellant.

P. Y. Cutter, for the respondent.

By the Court, MITCHELL, P. J. The defendant Wright and one Dardin made their promissory note, signed by each of

them, dated at Apalachicola, (in Florida,) October 11, 1841, whereby they promised to pay on first of May, 1844, to Curtis and Griswold, trustees of the Apalachicola Land Company, in the city of Apalachicola, $800, with interest from date, at the rate of eight per cent per annum. This was indorsed, without recourse, to the plaintiff. The defendants interposed among other things an answer, setting up the statute of limitations. The plaintiff replied, and the defendants demurred to so much of the reply as related to the statute. The demurrer was heard at a special term, and decided in favor of the plaintiff. Issues of fact were also joined; on these there was a trial before a jury, and a verdict was given for the plaintiff. Exceptions were taken by the defendants. The case now presents, for consideration, both decisions.

The only exceptions properly made at the trial were those relating to the question of usury. The whole evidence on that subject was the note and the following facts: Wright and Dardin were, when the notes were given, residents of Apalachicola; Curtis and Griswold were residents of New York. This, with four other notes, was given as part of the consideration money of lands in Apalachicola, bought by Wright and Dardin of the company. The contract for the purchase of the lands was proved. "The *negotiation* for the sale of the lands was made and *completed* with Joseph Brown, in Florida; but the final agreement was *made*" (in the words of the witness) "and the notes signed in the city of New York." The note was made (says the same witness) at the office of the company, in the city of New York, at the time of making the contract of October 11, 1841, which contract was made at the same time and place. There was no evidence of any desire of making a sham sale as a cover for a loan. On the contrary, the object of appointing trustees was to effect sales of lands which had been held by various owners, but with such complicity as to their respective rights, that it was difficult for them to sell. As the negotiation for the sale of the lands was not merely commenced, but was *completed* in Florida,

(with Joseph Brown, the agent of one of the parties, probably of the company,) all the terms of the contract must have been then agreed on, and would include what lots were to be sold, at what price, on what credit, and at what interest. A negotiation could not be *completed* until all these matters were agreed on expressly or by implication. The witness, therefore, when he said that the negotiation was completed in Florida, but the final agreement was made, and the notes signed in New York, must have meant that the contract was reduced to form in New York, and the notes signed here; not that any part of the *terms* of the agreement was here settled, so as to vary from those which were settled in Florida. By "agreement made" in New York, in connection with the rest of his evidence, he must have intended "agreement executed there."

The state of Florida allowing 8 per cent interest on contracts, there was no usury in the original agreement made in Florida, and the contract under it would be valid here, although reduced to writing here. The court was therefore right in *refusing* to charge that the note having been made and delivered within this state, was void for usury; also in refusing to charge that the note having been given for part of the purchase money of the lot, and the contract and note having been made here, the reservation of 8 per cent interest rendered the note void.

The court was requested to charge, that the fact that land in Florida formed the subject matter for which the note was given, was *immaterial* on the question of usury. If the lands had been in this state, it would have raised some grounds to argue that the contract was negotiated in Florida, to evade our laws; it was material, therefore, that the lands were in Florida.

The court was requested to charge that the note having been given in the state of New York, to residents thereof, according to a contract made in this state, and more than legal interest being reserved, the jury might find as a fact

that it was given as a *cover* for forbearance of more than legal interest. There was no evidence from which the jury could find that there was any cover. The transaction was all open and above concealment; the interest agreed on was openly stated in the very note on which the action was founded; there was nothing to raise a suspicion, even, that a sale of lands was resorted to as a cover for the loan of money. This and the two preceding requests speak of the "contract made" in this state. An exception is to be regarded as using words as a lawyer would use them. Under the evidence the contract was not made in New York; only the instrument describing it was made here. That was immaterial; if it could be considered that there was any doubt as to whether the witness did not mean that all the terms of the agreement were arranged in Florida, that would have been a question for the jury, and not to be assumed by the party excepting.

The judge charged the jury, that if the *contract* upon which the note was given, was *bona fide* intended to be performed in Florida, and was made in reference to the laws of that state, then such note was not usurious, though *made* in the state of New York and purporting to bear 8 per cent interest on its face. The judge here apparently disregards the fact proved in the case, that the negotiations for the contract were previously completed in Florida. That made the plaintiff's case very clear, and made any such charge as this last unnecessary. He might have charged the jury that there was no evidence of usury on the facts undisputed in the case; and when he may make a general charge, in favor of one party, he may also state the same conclusion, whether his reasons be right or wrong. For this reason the charge is not exceptionable. It is also correct in point of law. Every instruction of a judge to a jury must be considered in connection with the admitted or incontestible facts in the case. If among those is to be included the fact that the whole negotiation was completed in Florida, there could be no objection to the charge. If that is not be included, in its full extent, the

best that can be said for the plaintiff is, that a negotiation originated in Florida for the purchase of lands, and was carried on and in some sense completed there; that the parties then meeting here perfected their agreement here, which in good faith was intended to be performed, not here, but in Florida; and that it was made in relation to Florida lands, and in reference to the laws of Florida. As a general rule, a contract is to be construed by the laws of the place where it is to be performed: here, the performance, by the very terms of the note, was to be in Florida. If we would not allow the title to lands here to be affected by an agreement to pay interest beyond what our laws allow, even if the agreement provided for the payment of interest and principal in another state, that would be because no law but our own can affect our mode of passing title to, or incumbering our lands. But this is a personal contract, and the lands are not here, but in Florida. The contract would be good in Florida; it does not demand more than the laws of that state allow on mortgages of land. By the mode of presenting the question to the jury, they were to find that there was usury, if the transaction was not made *bona fide*. These circumstances are as strong as those in the case of *Curtis and others* v. *Leavitt, receiver of North Am. Trust Co.*, (15 *N. Y. R.* 1,) to exempt the contract from the operation of our usury laws. (*See opinion of Comstock, J., p.* 51, *&c.*)

I am of opinion that the broad proposition may be sustained that when a personal contract, by its terms, is to be performed in another state, and the place of its performance is not chosen with any intention to evade our laws, but because that place best suits the honest intentions of the parties, our usury laws do not apply to it, although it be made and executed here. Of course there would be a presumption of an intent to evade our laws, until some explanation should be made. There is, therefore, nothing in the exceptions to reverse the judgment.

As to the statute of limitations, the facts are to be gath-

ered from the pleadings. The note became due May 4, 1844; it was made in the city of New York: the defendant Wright paid $300 on it, as alleged in the answer, and as the reply admits and alleges; these stating that the payment was on the 9th of February, 1848. The summons was served 30th August, 1851, on the defendant Wright. The demurrer insists "that the reply of the said plaintiff to the defense set up in the answer of this defendant, that this action was not commenced against the defendant within six years, &c. is insufficient." This includes every part of the reply which may bar the plea, and so includes the allegation that the payment on the note was made on the 9th of February, 1848. That would be a complete bar to the statute.

The reply was regular in this case, since the code, before the amendment of 1852 allowed a reply where the answer contained new matter constituting a *defense* or set-off. (§ 153, [131,] *Voorhees' Notes.*) But the plaintiff in his reply sets up other matters as a bar to the statute, and these are also admitted by the demurrer. The whole time from 4th May, 1844, when the note fell due, to 30th August, 1851, when the summons was actually served, was seven years, three months and twenty-six days. In the first part of November, 1844, Wright departed from this state and became a resident of Florida, and continued there, and absent from New York, to 1st April, 1845. Again, about 1st November, 1845, he departed from this state and became a resident of Florida, and continued absent from this state until about the 1st of April, 1846. Again, about 1st November, 1846, he in like manner absented himself from New York and became a resident of Florida, until about 1st June, 1847; and in like manner from 1st November, 1847, to 1st April, 1848. Thus the aggregate of his absences was one year and ten months. In the mean time an injunction order was issued out of this court on behalf of this defendant, "by which this plaintiff (in the words of the reply) was restrained from taking any proceedings to enforce payment of said note." In October, 1850, during the pending of the in-

junction, Wright in like manner absented himself and resided in California. The injunction therefore continued two years and a half. While Wright was in California the plaintiff, on 15th May, 1851, (after the injunction was vacated,) placed a summons in the hands of the sheriff of New York, with directions to serve it, and with the intention to have it served as soon as Wright should return to this state. Afterwards another was issued to the sheriff of Saratoga, and served by him on 30th August, 1851. The plaintiff alleges that the defendant was not a resident of, or present in, the state of New York, for the term of six years in the aggregate, after the maturity of the note and before the commencement of this action.

The code retains the statutes of limitations which were in force when it was adopted, where the right of action had already accrued, according to the subject of the action and without regard to the form. (*Code*, § 73.) The revised statutes therefore apply. Those statutes required the action to be brought within six years after the cause of action accrued: but provided, 1st, that if at the time *when* the cause of action accrued against any person, he was out of this state, the action might be commenced within six years after his return to the state; and 2dly, that "if after the cause of action shall have accrued against any person, he shall depart from and reside out of this state, the *time of his absence* shall not be deemed or taken *any part* of the time limited for the commencement of such action." (2 *R. S.* 297, § 27.) The defendants insist that the statute does not apply to successive absences, but only includes the first absence after the cause of action accrued. This does not comport either with the object of the act, which was to give a plaintiff the same time for suing his debtor, who absented himself from this state, which it gave against one who remained permanently here; nor does it satisfy the words used. He who leaves the state and resides out of it a second and a third time after a cause of action accrues, as unquestionably leaves it each of those latter times, as when he first left it. The section quoted was intended to reach all cases: first, the

case where one was out of the state when the cause of action first accrued, and next, the case where one who was not here when the cause of action first accrued comes here and leaves it, no matter how often he leaves. The language is general; "the time of his absence shall not be deemed or taken as *any part* of the time limited." Similar language is used where one is stayed by an injunction: "the time during which such injunction shall be in force shall not be deemed any portion of the time in this chapter limited." (2 *R. S.* 299, § 35.) No one would contend that if an injunction was obtained and then dissolved, and afterwards another injunction obtained and perhaps continued for six years and then dissolved, the time covered by the successive injunctions would not be excluded from the statutory time. Similar language is used as to the time during which a plaintiff is prevented from suing because he was an alien enemy; (2 *R. S.* 298, § 32;) "the time of the continuance of such war shall not be deemed any part of the respective periods limited." Even without this express provision, the time of war was excluded; did not the statute clearly mean to include successive wars? The language is also similar as to persons privileged, as members of the legislature or of congress; "the time during which the action shall have been so prevented, shall not be deemed any portion of the time limited," &c. (2 *R. S.* 299, § 37.) Certainly it was as important to include the time when the debtor a second time was in attendance as a member of congress or of the legislature, as when he first went there. The language is very different as to persons under disabilities. It applies only to those who are under disability at the time the cause of action accrued, and they are to bring their actions within the respective times limited after such disability removed. It thus excludes every disability that arises after the cause of action accrues.

This view of the statute agrees with the *opinion* of McKissock, J., in *Burroughs* v. *Bloomer*, (5 *Denio*, 535, 6;) and with what seems *probably* to have been the *opinion* of the chancellor in *Didier* v. *Davison*, (2 *Barb. Ch. R.* 488;) and

with the decision in the superior court in *Ford* v. *Babcock*, (2 *Sand.* 530;) where the latter court strives to disenthral itself from the decisions of the supreme court as now organized. It differs from the decision in *Dorr* v. *Swartwout*, before Nelson, J., in the United States circuit court, reported 5 *Legal Observer*, 172, and from the *opinion* of Willard, J., in *Cole* v. *Jessup*, (2 *Barb. S. C. R.* 315.) *Dorr* v. *Swartwout* is said to have been since overruled by the United States court. (*See* 2 *Sand. S. C. R.* 530.) But *Cole* v. *Jessup* overlooked the opinion in *Burroughs* v. *Bloomer*, and the decison in it was for the *plaintiff*. It also falls into a natural error of treating the law as to *disabilities* of plaintiff, (which relates to matters personal to them,) as if it were the same as the law as to the acts or condition of the *defendant*. The language of the statute as above shown is different in the two cases. The language also is different, where the defendant is absent at the time when the cause of action first accrues, and when he departs from the state *after* the cause of action accrues. In the first case it is that the *action is to be commenced* within the six years *after the return* of the defendant to this state: in the other the language is changed, and is *not* "that the action is to be commenced after the return," but that "the *time* of the *absence* shall not be *any part* of the time limited." There must have been a motive for the change of phraseology, which is quite intelligible, whether the latter clause apply to successive absences only where the defendant was *here* when the cause of action accrued, or also to such absences where he was *absent* when the cause first accrued.

The time during which the injunction was in force, was also sufficient to bar the statute. But the defendant objected that the plaintiff was not now to be benefited by the injunction because he had not pleaded that the injunction was served on him. If an injunction is issued by the court at the instance of the defendant, as this was, and kept by him until it is *vacated*, which must have been on motion of this plaintiff, it does not lie in the mouth of the party obtaining it to say it

was not "in force." A defendant in an injunction suit who obeys its mandates without a service of the injunction is not to suffer on that account. It is in force as to him if it is brought to his knowledge, although he may not be liable to an attachment for contempt unless a formal service be made. The allegation in the reply that the *plaintiff was restrained* by the injunction from taking any proceeding, is more than a statement that an injunction with such words issued. It is that it issued and the plaintiff himself was restrained by it. That could only be by some service of the injunction which prevented his prosecuting his action.

The judgment in favor of the plaintiff should be affirmed, with costs.

[New York General Term, December 22, 1857. *Mitchell, Clerke* and *Davies*, Justices.]

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26 218
24a 389

Benson *vs.* Cromwell.

Where, upon a contract between B. and C. for the exchange of real estate, C. agreed to convey his property "subject to mortgages, not to exceed $4000 on each house and lot, with interest from the 1st of May" previous, to be assumed by B. as part of the consideration money; *Held*, that this was not to be construed as limiting the undertaking of B. to mortgages *then on the property;* and that B. therefore had no right to make it an objection to the title that the original mortgages had been canceled, and others substituted in their places, payable on the 1st of November.

And where B.'s counsel, after examining C.'s title, stated the objections to it, in writing, in eight different propositions, embracing special and minute objections to the proceedings in a foreclosure suit which were supposed to be irregular; no objection being made that the court had no jurisdiction over a suit of that nature; *Held*, that it was too late to raise the latter objection, for the first time, after a suit had been brought by B. to compel a specific performance, &c.

The decision in *Hall* v. *Nelson*, (23 *Barb.* 88,) to the effect that under the constitution the county courts have no jurisdiction of a suit to foreclose a mortgage, not acquiesced in.

Benson v. Cromwell.

APPEAL from a judgment given at a special term. The action was brought for the specific performance of a contract entered into between the parties for the exchange of real estate, and to recover damages sustained by the plaintiff, by reason of the defendant's non-performance. The cause was tried before a referee, who having heard the allegations and proofs of the parties, on the 22d April, 1856, made his report, dismissing the plaintiff's complaint, and ordering that the contract be annulled and rescinded, and that a judgment be entered accordingly, and that the defendant recover of the plaintiff $209 damages, in consequence of the non-performance of the contract by the plaintiff. On motion, an extra allowance of ten per cent was made to the plaintiff, by the court. The plaintiff appealed from the judgment.

A. Mann, jun., for the appellant.

J. W. Gilbert, for the respondent.

By the Court, MITCHELL, P. J. The plaintiff and defendant agreed to exchange real estate; Cromwell to convey his "subject to mortgages not to exceed $4000 on each house and lot, with interest from 1st of May, 1855, to be assumed by Benson as part of the consideration money." There were mortgages then on Cromwell's poperty; before the time for the completion of the exchange he removed those and substituted others. When the time for the exchange of papers came, the counsel for Benson objected that Benson should not assume these mortgages; that they were made payable on the 1st of November; and that if he did, Cromwell would foreclose them the day after they became due; or, in the words of his own counsel, he told Mr. Cromwell "that Dr. B. was *not bound to assume* the payment of any mortgages which were not on the property;" meaning at the time of the contract. Doctor Benson said his counsel advised him "that he was not bound to assume any mortgages except those on the property

at the time of the contract, and that he had acted on that advice." The contract did not describe mortgages *then* on the property as those to be assumed, nor any particular mortgages; but only specified the amount, and the time from which the interest was to run. The objection of the plaintiff was therefore groundless, and put him in fault.

The principal objection now raised, is that Cromwell's title was derived from a foreclosure in a county court. Benson's counsel, after examining Cromwell's title, stated the objections to it in writing, in eight different propositions. None of those object that no foreclosure could be had in a county court; but they are taken up with special and minute objections to the proceedings in the suit supposed to be irregular. This objection seems to have been raised only after this suit was brought; if presented in due time, it may well be that Cromwell could have obviated it by releases. He was, at all events, entitled to have notice of the objection, before a suit was brought against him by a contracting party, who was in fault in assuming and insisting on another untenable position, materially affecting the contract.

This would be a sufficient reason for that part of the judgment of the special term which declares the contract to be rescinded and annulled, and directs the instrument to be delivered up to be canceled. There is a decision in this court, in the second judicial district, to the effect that under the constitution the county courts cannot foreclose a mortgage. (*Hall* v. *Nelson*, 23 *Barb.* 88.) We do not acquiesce in that decision; but that case, with the decision in the court of appeals in *Kundolf* v. *Thalheimer*, (2 *Kern.* 593,) throws such doubt on a title thus derived, that a purchaser should not be required to take it. For this reason so much of the judgment of the special term as gives damages, costs and allowance to the defendant, should be reversed; and neither party should have costs against the other.

It is proper briefly to state our views as to the constitution. The case in the court of appeals arose in an action for an as-

sault and battery. Judges Gardiner and Hand each delivered written opinions, in which Judge Gardiner confines his understanding of the "special cases" in which county courts may have original jurisdiction to special *proceedings* existing in 1846, and similar special proceedings. Judge Hand's views are nearly the same, but he cautiously remarks, "perhaps it may be different in equity: for the legislature is authorized to confer upon the county judge *equity jurisdiction* in special cases. (*Art.* 6, § 14, *subd.* 4.") This prevented him and the court of appeals from being committed to extend that decision to equity cases. Judges Denio, Johnson, Crippen and Dean avoided the appearance of assent to the views of Judges Gardiner and Hand, by stating the grounds of their concurrence to be, "that the statute conferring jurisdiction on county courts in *actions of assault and battery* was unconstitutional." Judges Ruggles and Marvin took no part in the decision. In the case in the second district Justice Emott felt controlled by the decision in the court of appeals, although he does not hesitate to express his dissent from it, and shows strongly the danger of such a decision, when the law had met the approbation of the profession, and many titles depended on its being sustained. Justice Brown dissented from his associates.

The reasoning in the court of appeals admits that "*cases*" primarily means or includes *causes*. The section of the constitution referred to uses it in that sense. It says, "The county court shall have such jurisdiction in cases arising in *justices' courts* and in special cases, as the legislature may prescribe; but shall have no original civil jurisdiction, except in such *special cases*." The *cases* arising in justices' courts are causes—mostly common law causes—and unless "cases" includes such causes and not merely special *proceedings*, the legislature can give no appellate jurisdiction to the county courts over the justices' courts. And if the opinions in the case in the court of appeals are to be extended, that court must also pronounce any act giving an appeal to the county

court from decisions of the justices' courts unconstitutional, except in what were known as special proceedings, in 1846. Section 10 of this article in like manner uses the word cases. "The testimony in equity *cases* shall be taken in like manner as in *cases* at law." The reasoning in that case also depends on the adoption of a meaning of the word "special," allowable only where precision of language is not required, namely, "extraordinary." "Special" is contradistinguished from "general," as "species" is from "genus." This very article of the constitution makes this precise distinction, as applicable to this subject. Section 3 says, "There shall be a supreme court having *general* jurisdiction in law and equity." General was here used as distinguished from special. This court was to possess a power in law and equity as general as law and equity themselves are. There was to be no need of any specification of its powers by the legislature; and it may be that it was intended that the legislature should have no right to limit its powers. Having thus provided for a court with *general* jurisdiction, it was proper to provide for others with special jurisdiction, or jurisdiction in *special* cases; using the term *special* as contradistinguished from *general*. "Cases" was a more appropriate word than "causes," for it includes not only causes but special proceedings, and is more commonly used as including equity as well as common law actions, than the word "causes" is. "Cases in equity" is a more familiar phrase than "causes in equity." This would require the legislature to specify the cases in which the county courts should have jurisdiction; and it may be that the four judges who concurred in the decision in the court of appeals, "on the ground that the statute conferring jurisdiction on county courts in *actions of assault and battery* was unconstitutional," so held because the legislature did not "specify the cases" in which the county court was to have original civil jurisdiction, but gave it in *general* terms; terms almost as general, as to personal actions, as those in which the constitution confers

the powers on the supreme court, except by limiting the actions to the amount demanded and the residence of the defendants. The terms are "*civil actions*, in which the relief demanded is the recovery of a sum of money not exceeding $500, or the recovery of the possession of personal property not exeeeding in value $500," &c.

But the legislature does distinctly *specify* the power to foreclose a mortgage and sell the mortgaged premises, if they are situated within that county. (*Code*, §§ 30, 33.) To this also may be added, that as the sale of mortgaged premises by advertisement had been a special proceeding in daily use before the year 1846, it did not make it less a special proceeding within the meaning of the constitution, if the legislature authorized the same thing to be done in the county court. The constitutional right to confer the power on the county court would be clear, if the proceeding was to be there conducted in a summary way. It could not be lost, by requiring the formalities of an action in the same proceeding.

The word *special* is also used in the same sense as in the 9th section of the article, which speaks of "the *general* and *special* terms of the supreme court." Terms for special proceedings, such as were thus known in 1846 as distinguished from cases or causes, no one will say were intended. The 12th section, in the converse sense, speaks of the "general election of judges." So where it is said in section 14, that the legislature may confor equity jurisdiction in *special* cases upon the county judge, is it not plain that "cases" here means "causes in equity" as plainly as "equity *cases*" does in § 10, and then that "special" must mean such as are "*specified*" by the legislature, not thrown in mass in general terms upon the court. "Equity jurisdiction" properly applies only to formal actions in equity, and not to "special proceedings." Special proceedings in 1846 were seldom to be conducted by the chancellor or vice chancellors. They were still less frequently, *if ever*, considered a part of *equity jurisdiction*.

So much of the judgment rendered at the special term as gives damages, costs and allowances to the defendant, should be reversed. Neither party to have costs as against the other.

[New York General Term, December 23, 1857. *Mitchell*, *Davies* and *Clerke*, Justices.]

26 224
95a 605

Fowler and others *vs.* Depau and others.

A testator died in 1836, leaving a widow and seven children—two sons and five daughters. After making a provision for his wife, in lieu of dower, and giving certain legacies to others, the testator, by the sixth clause of his will, gave and devised all the residue of his estate, real and personal, to his five daughters, for life, in equal portions; and upon the decease of his said daughters respectively, leaving issue surviving, he devised to such issue, the principal and the real estate in which he had before given a life estate to his, her or their mother; to have and to hold such principal and real estate to such issue, and his, her or their heirs, &c. forever, in equal portions; and in case the issue of any or either of his daughters should die before attaining the age of 21, and without leaving any issue him or her surviving, then the testator directed the share or portion of the one so dying to go to his or her surviving brothers and sisters in equal portions, and the issue of such as should then be deceased, such issue taking the same share as his, her or their parent would have taken if living; and if either of his daughters should die without leaving issue surviving, then the remainder of the estate, both real and personal, thus allotted to such daughter, should fall into and constitute part and parcel of the residue of the testator's estate, and belong to the surviving sisters and their issue, in the manner and proportion before specified. By the seventh clause of his will, the testator directed that in case both, or either, of his sons should marry, he or they so marrying, and his or their issue, should be put upon the same footing, in all respects in regard to his estate, both real and personal, as the daughters and their issue; and in that event the rest, residue and remainder of his estate, real and personal, should be divided into six or seven equal parts, as the case might be, and be divided and distributed among his said married son, or sons, and daughters and their respective issue, in the manner and portions directed in regard to the daughters; the shares of grandchildren not to be paid over to them before they attained the age of thirty years; they in the mean time receiving only the interest or income. The children of the testator were all of full age, and all except F. A. D. were married, and had children living,

F. A. D. married after the death of the testator, and died, leaving a son, F. D., who was still living.

Held, 1. That the whole sixth clause of the will was valid; and that even if the latter part of the clause were not so, its invalidity would only affect the share of a child of the testator who should die without leaving any issue, and would not impair any other share, or the devise in the previous part of the 6th clause.

2. That each of the children of the testator was entitled to an estate for life, in one equal undivided seventh part of the estate of the testator, and that the children of each child were entitled, as tenants in common, to a vested remainder in fee in said one seventh part in which their parents had a life estate, subject to be divested in quantity by letting in after-born children, and to be divested entirely by the death of either of said grandchildren before its parent, or before reaching 21 years of age, and without leaving lawful issue him or her surviving, and leaving brothers or sisters him or her surviving.

3. That F. D., one of the grandchildren of the testator, and son of F. A. D., deceased, was entitled to an absolute estate, in his own right, in fee simple, in the one other equal undivided seventh part of the estate; the principal, however, not to be paid to him until he should attain the age of thirty years.

4. That by the terms and provisions of the will, the absolute ownership of each class of grandchildren in the respective shares in which their parent had a life estate, was only suspended during the lifetime of such parent; and that in case the issue of any or either of said children of the testator should die without leaving lawful issue, the share or portion of the one so dying would go to his or her surviving brothers and sisters in equal proportions, and the issue of such as should then be deceased, such issue taking the same share as his or her parent would have taken if living; and that a contingent remainder was thereby created, to take effect in the event that the persons to whom the first remainder was limited, should die under the age of 21 years, and without leaving lawful issue him or her surviving.

5. That the provision whereby the testator directed that the principal of the estate should not be paid over or delivered to the grandchildren until they respectively attained the age of thirty years, was a good and valid restriction.

6. That a division and partition of the real and personal estate should be made into seven equal parts or shares, upon these principles, by the executors, with power to them to sell the real estate.

By another clause of the same will, the executors were appointed trustees, in these words: "I hereby constitute and appoint (them) the trustees of my daughters and grandchildren, during their respective lives." *Held*, that this provision was inoperative, as to the real estate, and left the legal estate in the children and grandchildren, under § 49 of 1 *R. S.* 728.

The will merely "authorized and empowered" the executors to sell the real estate. It did not direct or order them to sell it; nor did it authorize the sale for any purpose of distribution, or to carry out any trust. *Held*, that

this gave a mere power, to be exercised only if found convenient; that it was not imperative, and was not a power in trust; and that no beneficiary could compel a sale against the judgment or will of the executors.

To cause a conversion from real estate to personal, the will should decisively and definitively fix upon the land the quality of money.

APPEAL from a decree made at a special term. The action was brought by Theodosius O. Fowler and Mortimer Livingston, individually and with their wives, and also as sole surviving executors of the last will and testament of Francis Depau of the city of New York, deceased, for a construction of said will; to have their accounts as executors and trustees since January 31, 1854, passed; for a partition and division of the estate among the parties entitled thereto; and for the appointment of separate trustees, for the several shares. The testator died on the 13th day of January, 1836, having duly made his last will and testament, dated April 16th, 1833, which was duly proved as a will of real and personal estate on the 4th day of April, 1836, before the surrogate of the county of New York. By his will, after giving to his wife an annuity of $6000 and making other bequests in her favor, which annuity and bequests were to be in lieu of dower, and giving some legacies to a portion of his children, he devised as follows: "*Sixth.* All and singular the rest, residue and remainder of my estate, both real and personal, in possession, reversion, remainder or in expectancy, and howsoever and wheresoever situate, I hereby give, devise and bequeath to my five daughters, that is to say: Amelia Fowler, the wife of Theodosius O. Fowler, Eliza Fox, the wife of the said Doctor Samuel M. Fox, Caroline Livingston, the wife of Henry W. Livingston, Sylvia, the wife of Mortimer Livingston, and Stephania Coster, the wife of Washington Coster; to have and to hold the same to my before named five daughters, during the period of their respective natural life, in equal portions, or share and share alike; and upon the decease of my said daughters respectively, leaving issue surviving at the time of such death, I hereby give, devise and bequeath to the

surviving issue of such daughter so dying, the principal and the real estate, as the case may be, a life estate in which I have hereinbefore given to their, his or her mother during her natural life; to have and to hold such principal and real estate to such issue, and their, his or her heirs, executors, administrators and assigns forever, in equal portions, if more than one, or share and share alike; and in case the issue of any or either of my daughters should die before attaining the age of twenty-one years, and without leaving any issue him or her surviving, then I direct the share or portion of the one so dying to go to his or her surviving brothers and sisters, in equal portions, or share and share alike, and the issue of such as may then be deceased, such issue taking the same share as his, her or their parent would have taken if living; and should either of my said daughters die without leaving issue, at the time of such death, surviving, then the remainder of the estate, both real and personal, hereby allotted to such daughter so dying, shall fall into and constitute part and parcel of the residue of my estate, and belong to the surviving sisters and their issue, in the manner and proportion herein already specified.

Seventh. In case both or either of my before named two sons should marry, then I do hereby direct, and such is my will, that he or they so marrying, and his or their issue, shall be put upon the same footing, in all respects, in regard to my estate, both real and personal, as my before named five daughters and their issue; and, in that event, the said rest, residue and remainder of my estate, both real and personal, shall be divided into six or seven equal parts, as the case may be, and be divided and distributed among my said married son, or sons and daughters, and their respective issue, in the manner and portions above directed, in regard to my said daughters; and I do further direct, that the principal of my estate, both real and personal, hereinbefore given to my grandchildren respectively, should not be paid or delivered over to them, until they severally attain the age of thirty years; but

that they may respectively have and enjoy the income and interest thereof, from the times when they may severally become entitled thereto, upon the death of their respective parents."

The testator appointed his five sons-in-law, Theodosius O. Fowler, Henry W. Livingston, Samuel M. Fox, Mortimer Livingston and Washington Coster, and also his friends, John Bolton and George W. Strong, executors of his will; and such of them as should qualify as such executors, and the survivors and survivor of them, he constituted and appointed the trustees of his daughters and grandchildren during their respective lives.

The testator left him surviving seven children—two sons and five daughters—all of full age, and all, except Francis A., married and having children living. Francis A. married after the death of the testator, and died, leaving an only child, Francis Depau, now living. Letters testamentary were issued by the surrogate to the plaintiffs Theodosius O. Fowler and Mortimer Livingston, and to Henry W. Livingston, Samuel M. Fox and Washington Coster, who alone qualified as executors.

The executors, in pursuance of these directions of the will, had paid the income to the seven children, and had held and managed the principal of the estate, (which now amounts to one million of dollars,) for the period of 20 years. The parties, adults and infants, all appeared by solicitors and guardians *ad litem*. General answers were put in on behalf of the infants, submitting their rights under the will; and, on behalf of three of the adult defendants, the answers claimed and insisted that the provisions of the will were opposed to the limitations provided in the revised statutes, and that the remainders contained in said will were therefore void, and they prayed for a judicial construction of said will, and that the testator's estate might be divided into seven equal parts, and divided or distributed in fee, and absolutely, among his seven children, or their heirs and representatives.

The cause was tried before Justice DAVIES, at a special

term, on the 2d of May, 1856; who, after hearing the testimony, certified the following as his conclusions of law, viz:

That by the true construction of the will, under the provisions whereof the property sought to be partitioned is held, the whole estate of the testator was to be deemed personal from the time of his death, and the executors and trustees named were directed, in pursuance of the power to them given in said will, to convert into personal property the remaining realty of said estate, and to hold the same, when so converted into personalty, in trust, according to the provisions of said will, until the appointment of their successors in said trust. That the rights and interests of the said parties, plaintiffs and defendants, were as follows: Each of the children of the testator was entitled under said will to an estate for life in one equal undivided seventh part of the estate of the testator, and that the children of each child, the grandchildren of said testator, were entitled, share and share alike, as tenants in common, to a vested remainder in fee in said one equal undivided seventh part in which their respective parents have a life estate, subject however to each one's share, to be divested in quantity by letting in after-born children, and to be divested entirely by the death of either of said grandchildren before its parent, or before attaining twenty-one years of age, and without leaving lawful issue him or her surviving, and leaving brothers and sisters him or her surviving. That Francis Depau, one of the grandchildren of said Francis Depau, deceased, and son and only child of Francis A. Depau, deceased, was entitled under said will to an absolute estate in his own right in fee simple in the one other equal undivided seventh part of the said estate, the principal of the said share however not to be paid to him until he attains the age of thirty years. That by the terms and provisions of said will, the absolute ownership of each class of grandchildren in their respective shares in which their parent had a life estate, was only suspended during the lifetime of such parent; and that in case the issue of any or either of said children of the testator shall die without leaving lawful

issue him or her surviving, the share or portion of the one so dying will go to his or her surviving brothers and sisters in equal proportions, or share and share alike, and the issue of such as shall then be deceased, such issue taking the same share as his or her parent would have taken if living, and that a contingent remainder in fee is thereby created, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, and without leaving lawful issue him or her surviving. That if any of the children of the testator who are entitled to life estates under said will should die without leaving issue, the said testator had not in and by his said will made any valid provision for such a contingency, and in the happening of any such contingency the testator should be deemed to have died intestate as to such share or shares, and such share or shares would thereupon vest absolutely in the heirs at law of the testator. That the provision in said will, whereby the testator directs that the principal of the estate shall not be paid over or delivered to the grandchildren until they respectively attain the age of thirty years, was a good and valid restriction. That the rights and interests of the parties to this suit are subject to all such orders as this court or any court of competent jurisdiction have made, or shall make, in regard to the same. That after the conversion of the remaining real estate into personalty, a partition should be made into seven equal parts or shares among the parties to this suit, according to their rights and interests therein, upon the principles above mentioned. That trustees should be designated for the respective shares, to hold and manage the same during the lifetime of the respective persons entitled to life estates, and to pay over and deliver the same to the persons entitled under said will, as remaindermen, their shares respectively, after the termination of the life estate. That a referee should be appointed to make such division and partition, and to designate the said trustees and whether security should be required from said trustees, and to take and state the accounts of said executors from the 31st

day of January, 1854, to the time of the division of said estate, and to report to this court. That upon such division and accounting being made, the executors should assign and deliver over the respective shares to the respective trustees designated, and receive their discharge. That the costs of the respective parties, with a reasonable allowance, should be paid out of the funds of the estate by the executors. And that the mortgages given by Stephania Coster and Caroline D. Livingston, to the United States Trust Company of New York, are valid liens upon their respective shares in said estate.

From the decree entered at special term in pursuance of the above finding by the judge, the defendants Lewis A. Depau and Stephania Coster, children of the testator, and Theodosius A. Fowler and Sylvia Livingston, grandchildren of said testator, and The United States Trust Company of New York, mortgagees of the life estate of the said Stephania Coster, appealed to the general term.

A. Hamilton, jun., for the plaintiffs.

James H. Storrs, for the defendants L. A. Depau and Stephania Coster.

Josiah Sutherland, for the defendants H. W. Livingston and wife.

Walter L. Livingston, for infants.

Cambridge Livingston, for the defendants Johnston Livingston and wife.

E. S. Van Winkle, for United States Trust Company.

George A. Halsey, for T. A. Fowler and wife.

By the Court, MITCHELL, P. J. Francis Depau in the year 1833 made his will, and died in 1836. He left two sons

(Francis and Lewis A.) and five daughters. The testator gave to each of the sons an annuity so long as he should remain unmarried. At the date of the will both of the sons were unmarried, but Lewis A. married before the death of the testator, and Francis A. after the testator's death. The testator gave his residuary real and personal estate to his five daughters for life, and then over as hereafter mentioned; but provided that if either or both of his sons should marry, he or they and his or their issue should come in and share in all respects as his daughters and their issue. Both sons did marry. This caused the residuary estate to be divisible into seven instead of five shares. The testator "authorized and empowered" his executors and the survivor of them to sell his house and lot, 358 Broadway, with the concurrence of his wife, and the rest of his real estate without her concurrence. He also appointed them "the trustees of his daughters and grandchildren during their respective lives," but without any express declaration as to what the trusts should be. The sixth clause contains the said devise and bequest of the rest, residue and remainder of the testator's real and personal estate. Construing it as admitting the two sons, it gives said estate to the seven children to hold during their respective lives, in equal portions. This gave to each an undivided one-seventh part for life. Then it provides for two contingencies, in the *alternative*, (one of which must occur,) and makes different dispositions of his property accordingly; one in case a child dies leaving issue surviving her; the other in case the child leaves no issue surviving her or him. Upon the decease of a child leaving issue surviving, he gives to such issue the principal and the fee of the share in which the parent of such issue had a life estate. This was a remainder upon a life estate—a remainder in fee upon a life estate in one undivided seventh part. Next he provides for another contingency. This issue might die before attaining the age of 21 years. The testator accordingly declares that if the issue of any child should die before attaining the age of 21 years and without leaving issue surviving him, his or her

share should go to his or her surviving brothers and sisters in equal portions, and the issue of such as may be then deceased, *per stirpes*. This is "a contingent remainder in fee created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of 21 years." It is thus expressly sanctioned by the 16th section of 1 *R. S.* 724, which authorizes such a contingent remainder, and makes it an *exception* to the rule forbidding the suspension of the absolute power of alienation for a longer period than during the continuance of not more than two lives in *being* at the creation of the estate.

The whole of the provisions of the will in the first alternative contemplated by the testator are thus seen to be valid. The other provision—made upon another contingency, on the other alternative—forms no connecting or concatenous part of the first: it does not provide for part of the same chain of events, nor form part of the estates to be created in the succession of events first provided for. It provides for an event *contrary* to that for which the first provides. The two cannot therefore be united as if forming part of one estate, and thus defeat each other. That second provision is, in case any child of his should die *without* leaving issue surviving him or her, then neither of the preceding remainders is to arise, for *they* were to the children or grandchildren of the testator's child who left issue; *this* for the testator's child who should leave no issue. In this last event the remainder in the share allotted to the testator's daughter, (she dying without issue,) is to form part of the testator's residuary estate and to belong to the surviving brothers and sisters of such deceased one and their issue, in the manner and proportion herein already specified. This would vest the one-seventh, on the death of the testator's child, in her brothers and sisters equally for life if they were living, and remainder to their issue in fee, with a contingent remainder over if such issue died under 21 years of age. In this case the power of alienation would be suspended as to one-seventh part during the

life of the testator's child; next, (taking the strongest case against the validity of the devise, as is necessary, and supposing, therefore, all the other children of the testator to be then living,) a separate one-sixth part of said one-seventh part would pass to each of the six surviving children of the testator, for life, remainder in fee as to each separate one-forty-second part of the estate, to the issue of the said second taker for life, with a contingent remainder over as to the same one-forty-second part, to the surviving brothers and sisters of any one of the issue dying under 21 years of age. The power of alienation then would be suspended as to each one-forty-second part during the life of the first taker of the one-seventh, and during the life of the next taker for life, and then the remainder would vest in fee in the issue of the second taker for life, with a contingent remainder over in fee to take effect in the event that the persons, to whom the remainder is limited, shall die under 21 years of age, In other words, the power of alienation as to each one forty-second part is suspended only during two lives in being at the creation of the estate, and on the contingency of the first remainderman dying under 21 years of age. This is expressly authorized, as before shown. It may seem an objection, that the first one-seventh is thus divided into six parts, and that a like contingency thus attaches to each one-sixth of that one-seventh; and it may seem that thus the estate is made to depend on six lives. This can seem so only by not distinguishing between the land and the estate. Each separate one-seventh, immediately on the death of the first taker in the case supposed, becomes divided into six equal parts, a separate one-sixth passing to each of the six individuals, so that no one of the other five has any interest in it. It would be entirely different if the shares were joint, with a joint interest as joint tenants and not as tenants in common. The testator has thus cut up his estate into 42 equal parts, and given six of those equal parts to each child for life, and then, in the event supposed, one of each of the last six equal parts

to each of the second takers. This he might have done, and he has done it, in more general language.

It is supposed, however, that if one child should die without issue and her estate be divided into six equal parts, and one of her brothers and sisters should afterwards die without issue, not only his one-seventh would fall into the residue and be divided as the share of the previous decedent was, but that also the one-forty-second part of the testator's estate which the second taker acquired from the previous decedent would pass in the same way. The will does not say so: it had "allotted" (to use its words in this clause) a life estate to each child in the first part of this clause, and provided for a remainder over, also in the first part of this clause; it is that remainder, which was one-seventh of his estate, and that only, which the testator gives over, not a new remainder in a one-forty-second part to arise out of the contingency provided for in the latter part of this clause. It is the one remainder in the estate allotted to the daughter so dying, and that only, which is to fall into the residue. The language of the will, after providing for the life estate to each daughter with remainder over, is, "should either of my said daughters die without leaving issue at the time of such death, surviving, then the *remainder* of and in the estate, both real and personal, *hereby* allotted to *such* daughter so dying, shall fall into," &c. The remainder of the estate hereby allotted, means the remainder in that part of the estate which was hereinbefore allotted to said daughter; and does not include any estate which the daughter might acquire by the prior decease of a sister or brother.

Again, successive contingent limitations over of an estate are not to be implied, without a very clear intent to that effect. *Jarman* (*see his edition of Powell on Devises, vol.* 2, *ch.* 32) considers that cross remainders may be *implied* on a devise of an estate in *tail*, but seems to hold that cross executory limitations are not to be implied in a devise in *fee*, or a bequest of personal estate. Much less should *successive* limitations be implied

when there is no clear direction of the testator to that effect. Even in case of estates tail, cross remainders are implied from a devise over, when such words as these are used, "in case *all* the first takers shall die without issue:" that makes *successive* estates among the first takers necessary before the devise over shall take effect. Here the devise to the brothers and sisters is complete as to each share, on the death of the one tenant for life of that share without issue, and there is no devise over, in case *all* the children of the testator die without issue. It has been before observed, that the provision in the latter part of this sixth clause is not in continuation of the events provided for in the former part of the clause, but on another event and in the *alternative*. In such case, if the last limitations over be too remote, it does not affect the other; and the will is valid or not, according as the event shall be. So here, if the devise on the event of a daughter dying without issue is too remote, it does not affect the devise made on the reverse supposition of a daughter leaving issue at her death. The distinction is seldom adverted to, but is clearly stated, in reported cases, and in some of the elementary writers on wills. The rule is, that if on a particular contingency the power of alienation is so suspended that it may *possibly* exceed the limits prescribed by law, the estate granted on *that particular* contingency is void; but this defect, which would affect the estate only if that contingency had occurred, can have no effect on it if that contingency does not occur; then that unlawful estate is not attempted. Accordingly, the good alternative estate is sustained notwithstanding the defect which would have been in the other, if the course of events had created it. *Jarman*, in his edition of *Powell on Devises*, (*vol.* 2, *p.* 400, 1,) after speaking of the unlawful suspension, says: "But care should be taken to distinguish between those cases, and those in which the devise over is limited to arise on an *alternative* event—one branch of which is within and the other is not within the prescribed limits; so that the devise over will be valid or not, according to the event. As

in the case of a limitation to A. and his heirs, and if he shall die *without leaving any issue at his death*; *or leaving such*, they shall die under 23, then to B. in fee. Here there are two distinct and alternative events, on which the executory devise is to arise, as leaving *no* issue at his death, and his *leaving issue* who shall die under 23. If the first event happen, i. e. if A. die without leaving issue at his death, the executory limitation is clearly good, as it would have been upon a simple devise over, on this event; but if the second event happen, i. e. if A. leave issue, though they die not only under 23, but under 21, (or any other age actually and in event within the prescribed limits,) it would be bad." It is evident that in the latter case the devise over is *dependent* on the *same contingency* as the intermediate remote limitation, and it consequently shares the same fate; but in the former it arises on a collateral event, and therefore stands independently of such limitation: or in other words, the one is *ulterior*, and the other *alternative* to the prior limitation. See also there quoted the remarks of Lord Alvanley in *Crompe* v. *Barrow*, (4 *Ves.* 681.) *Lewis on Perpetuities*, (*p.* 170,) thus states both rules: "A limitation which will not *necessarily* take effect, if at all, within the time prescribed by the rule against perpetuities, will not be made valid by any events happening subsequently to the time of the creation of the limitation." And in a note he adds: "This rule is subject to an exception as to executory limitations to take effect on *either of two contingencies*, one of which is within and the other without the limits prescribed by the rule against perpetuities; and when, therefore, *events* must be looked at in order to decide the destination of the property in respect to one or other of the ultimate limitations." He then refers to *ch* 21, (*p.* 501,) where he states both rules again, and after stating the first, adds: "But there is an exception to this rule, in some degree founded on the rule itself. It is, that where a limitation is made to take effect on two *alternative* events, *one* of which is too remote, and the other valid as

within the prescribed limits, although the gift is *void* so far as it depends upon the remote event, it *will be* allowed to take effect *on the happening* of the alternative one." "And gifts of this kind, so far differ from all other limitations in the construction to be put upon them in reference to the laws of remoteness, that the *validity of them depends entirely on subsequent events;* if the *event* be such as gives operation to the *remote* contingency, then the limitation is wholly void. If, on the other hand, the *actual* state of things corresponds to that contemplated by the *alternative valid* branch of the contingency, the gift takes effect." (*See Law Lib. vol.* 52.) The same rule is better and concisely stated in the supplement to the last work. (*Law Lib. vol.* 66.) He says (*p.* 169,) as follows: The general doctrine that if a limitation is made dependent on the happening of either of two events, one of which is too remote, but the other is not, it will take effect if the latter event happens, is supported by the case of *Minter* v. *Wraith*, (13 *Simons*, 52. *See also other cases quoted.*) In *Minter* v. *Wraith*, (*p.* 62,) the vice chancellor so decided, and there said: "It has been decided, (*Longhead* v. *Phelps*, 2 *W. Bl.* 704,) that when there is a limitation to take effect in two events, one of which is too remote, and the other is within the limits and does take effect, the limitation is good." This was an essential point in the case before the vice chancellor. In *Longhead ex dem. Hopkins* v. *Phelps*, (*supra,*) the counsel for the plaintiff argued that the trusts of a term were void, being on too remote a contingency—the dying of the issue male of the marriage without issue generally. But the court, without hearing counsel for the defendent, were clear that the first part of the contingency was good, viz. "in case John and Mary died without leaving issue male"—and as that happened in *fact* to be the case, they could not enter into the consideration, how far the other branch of the contingency might have been supported—and ordered judgment for the defendant.

The whole sixth clause of the will is therefore valid; and if the latter part of the clause were not so, its invalidity would

only affect the share of a child of the testator who should die without leaving any issue, and would not impair any other share, or the devise in the previous part of the 6th clause.

The clause of the will appointing the executors trustees is in these words: "I hereby constitute and appoint (them) the trustees of my daughters and grandchildren during their respective lives." If this be not a trust to receive the rents and apply them to the use of the daughters and grandchildren respectively for life, it would be merely inoperative as to the real estate, and would leave the legal estate in the children and grandchildren, under § 49 of 1 *R. S.* 728. So I am inclined to regard this clause. It does not profess to give the estate itself to the trustees: it appoints them trustees, not of the *estates* of the children, &c. but trustees of the children themselves; intending to make them curators or guardians over, rather than possessors of, the estate; but this intention is frustrated by the above section 49.

As to the power to sell the real estate. The will merely "authorizes and empowers the executors" to sell the real estate. It does not direct or order them to do so; nor does it authorize the sale for any purpose of distribution, or to carry out any trust. It gives a mere power, to be exercised only if found convenient. It is not imperative, and is not a power in trust; the beneficiaries are the same, whether the estate remains real or be converted into personal: no beneficiary can compel a sale against the judgment or will of the executors. To cause a *conversion* from real to personal, the will should decisively and definitively fix upon the land the quality of money, as Lord Rosslyn said in the converse case as to the conversion of money into land. (*Walker* v. *Denne*, 2 *Ves. jun.* 184.)

If these conclusions be correct, some slight alterations should be made in the judgment below. It should be corrected, where it states that the whole estate of the testator is to be deemed personal estate from the death of the testator, and where it *requires* the executors to sell the real estate

and to hold the proceeds in trust; and also in that part which declares the provision in the will on the event of a child dying without issue to be void. That part also which directs a distribution of the estate after the conversion of the real into personal should be so corrected as to direct a division and partition of the personal and real, with power to the executors to sell the real estate, and the executors should make the partition and division instead of a referee, (unless they be interested,) although this last might not be material. In other respects (and those are the most material) the judgment below should be affirmed, with costs.

[New York General Term, December 23, 1857. *Mitchell, Davies* and *Clerke*, Justices.]

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THE PEOPLE, *ex rel.* Dinsmore & Wood, *vs.* THE CROTON AQUEDUCT BOARD OF THE CITY OF NEW YORK.

THE PEOPLE, *ex rel.* J. P. Cumming and T. Cumming, jun., *vs.* THE SAME DEFENDANTS.

Under section 501 of the ordinance of 1849, organizing the departments of the corporation of the city of New York, which provides that no bid or estimate for a corporation contract shall be rejected for any error of form, provided the persons making it shall correct the same, and make it in conformity with the ordinance, within twenty-four hours after *notice* of such defect, the notice of any defect need not be in *writing*.

Under section 497 of that ordinance, which requires the estimate to contain certain statements, and that it shall be verified by the oath of the *party* making the same, if an estimate is made by a partnership, the oath of *each partner* is necessary.

To warrant the granting of a *mandamus*, the applicant must have a clear legal right.

A bidder on proposals issued by the city corporation for estimates, acquires no *legal right* or cause of action, to enforce which a mandamus will be issued, until the contract has been made with him, and approved by the common council, as provided by section 494 of the ordinance of 1849.

Where the Croton Aqueduct Board advertised for proposals for the construction of a new reservoir, and D. & W. made and presented an esti-

mate or bid which was rejected by the board as being defective, for want of a proper verification, and the contract was awarded to a higher bidder; *Held* that a mandamus would not be granted in behalf of D. & W. requiring the Croton Aqueduct Board to *entertain and consider* their bid, and thereupon to award the contract to the lowest bidder.

Held also, that the writ could not be issued, on the application of other bidders claiming to be the lowest bidders who had complied with the ordinance, directing the board *to award the contract* to the applicants as being the lowest bidders.

APPEAL, in the first of the above causes, from an order made at a special term, denying a motion for a mandamus; and motion, in the second cause, for a mandamus, ordered to be heard, in the first instance, at a general term. In July, 1857, the Croton Aqueduct Board of the city of New York advertised for proposals for the construction of a new Croton reservoir in Central park. Proposals were put in by a number of persons; the three lowest being by Dinsmore & Wood; by Fairchild, Holman, Walker & Brown, and by John P. and Thomas Cumming, jun. The proposal of Dinsmore & Wood was the lowest of all. This proposal, on the opening of the bids by the Croton Aqueduct Board, on the 26th of August, 1857, was objected to as defective. The only defect necessary to be here stated was in the verification of the estimate. It was verified by the oath of Dinsmore alone, instead of being verified by both Dinsmore & Wood. This, it was contended, was not a compliance with section 497 of the ordinance of 1849, organizing the departments of the corporation, which requires such estimates to be verified by the oath of the party making the same. This defect in the bid was orally announced at the meeting of the board, and the bid publicly laid aside as defective, for want of sufficient verification; and this was done in the presence and hearing of Dinsmore; but no written notice was ever given to either bidder, nor any communication made by the board to Wood. Dinsmore & Wood subsequently applied for a mandamus requiring the Croton Aqueduct Board to *entertain and consider* their bid, and thereupon to award the contract to the lowest bidder.

The motion for the madamus was heard at special term before Justice PEABODY, and was denied; the following opinion being rendered by him:

PEABODY, J. "The Croton Aqueduct Board, in July, 1857, issued proposals and advertised for bids for the construction at New York hill of a new reservoir for the Croton water, to cover 106 acres of land, and to be 40 feet in depth. The relators in due time made their bid or estimate for the work, in which they offered to do it in 600 working days, for $524,298.97, which, they say, was a less sum than was bidden by any one else. The defendants refused to consider or entertain the bid for two reasons, to which, on the argument, they added a third.

1. That the estimate of the relators was verified by the oath of one only of the relators, namely, Dinsmore, whereas it should have been by the oaths of both.

2. That the estimate, being made by the relators under the firm name of Dinsmore, Wood & Co., was in violation of the statute prohibiting the use of the words, "and company," or "and Co.," except to the present and actual partner.

3. On the argument the objection was made, for the first time, that the persons offering themselves as sureties had not added to their names their places of residence, respectively.

As to the first of these objections, part 3 of title 3, of an ordinance passed May 30, 1849, did establish certain regulations relative to contracts to be made, as follows: § 497 provides that each estimate shall contain, among other things, 1. The name and place of residence of the person making it. 2. The names of all persons interested with him therein, and if no other person be so interested, shall distinctly state that fact. 3. That it is without connection with any other person making an estimate for the same purpose, and is fair, &c. 4. That no member of the common council, head of department, chief of bureau, deputy thereof, or clerk therein, or other officer of the corporation, is directly or indirectly interested therein,

&c. &c. And section 498 provides as follows: "It (meaning the estimate) shall be verified by the oath, in writing, of the party making the estimate, that the several matters stated therein are in all respects true." An oath in this case was made by Dinsmore alone, and none was made by Wood; and it is urged, as a reason for excluding and refusing to consider the bid, that the oath was not sufficient, but the oath of both was required by the ordinance.

The estimate was made by the relators, (to quote the language in which they describe themselves,) by John M. Wood, of Portland, Maine, and Samuel P. Dinsmore, of the city, county and state of New York, "under the name and style of Dinsmore, Wood & Co." The argument, on both sides, seemed to assume, that the estimate was made by the firm of Samuel P. Dinsmore & Co., composed of the relators, and I am inclined to think that this is the case. The parties describe themselves in the body of the paper by, and in form make the estimate in, their individual names, adding thereto the words, "under the name and style of Dinsmore, Wood & Co." It commences, "Proposals" * * * * "made by John M. Wood of * * * and Samuel P. Dinsmore of" * * *. They do not assume to contract in form as a firm, nor do they even describe themselves as members of, or say that they compose, the firm. This looks more like the act of the individuals jointly than that of the partnership, but the addendum, "under the name and style of Dinsmore, Wood & Co.," is entirely unmeaning, unless it means that the individuals, who are so described, are acting as the firm or partnership of that name. This, I think, is the meaning of the language in this part of the proposals, and the signatures are quite consistent with this interpretation. The paper is signed with the full names of the two partners individually, and also with the name of the firm; and here the name of the firm seems to be entirely without effect or purpose, if the act is not done by it rather than the individuals; whereas, the use of the names of the partners (although unnecessary) is

not so inconsistent with the idea that they intend to contract as a partnership firm.

Assuming, then, that the bid is made by the partnership firm of Dinsmore, Wood & Co., composed of Samuel P. Dinsmore and John M. Wood, is the oath of Dinsmore alone a compliance with section 498, which requires that "it (the estimate) shall be verified by the oath, in writing, of the party making the estimate, &c. &c.?

To my mind the question is one of no ordinary difficulty: and the very able arguments have left me in great doubts about it. The literal meaning of the word "party" affords no guide. It is as consistent with the claim of one party as the other. It means, as naturally, a body composed of several individuals, as a body sole and individual, and no more so. The term "party," used in reference to a contract like this, (for this estimate is a contract in itself, or one part of a contract,) may as readily mean a class or body consisting of several members, who hold a certain relation to it, as one member, the sole representative of that interest; and the term would be equally proper in speaking of the author of this estimate, if that author were a single man, or a partnership firm, or a corporation; or, indeed, any number of persons composing the body, provided they were united in interest and acting jointly as a unit. In this case, for instance, Messrs. Dinsmore and Wood were, beyond all question, competent members of the firm of Dinsmore, Wood & Co., and as to the world, and all persons other than themselves, whenever they act together as a firm, they are properly styled a party to the transaction in reference to which they act; while among themselves (*inter sese*) each of them, in reference to the other, is properly styled a party, and the two together are properly, as to each other, styled parties. Each of them, for instance, is a party to the contract of partnership between them, while the two together are with equal propriety styled a party or one party, in relation to this estimate or contract.

The abstract, lexicographical definition, or meaning of the

term, affords no aid in this inquiry. It every where implies unity; but is as properly used to signify a unit composed of many parts, as an individual, or one incapable of division, actual or speculative, if such an one can be. We must, therefore, look to other sources for light on this subject. It must be drawn from the context and the connection in which it is used, and here too it can be found only with great difficulty and is very dim.

Section 497 provides, that the estimate shall contain (1st,) "The name and place of residence of the *person* making the same." Here the word "person" is used. Not that the estimate must not be made by more than one person, for it evidently may be made by more than one; while the word itself cannot literally signify more than one; and the meaning of this sentence is, that the estimate must contain the name and place of residence of the person making it, *and the names and places of residence of the persons, if there be more than one person making it.* So subdivision second of the same section provides, that the estimate shall contain the names of all persons interested with "*him*," as if the bid or estimate could only be made by a single person, which, (as I have said,) it is apparent to any one, could not have been intended. In both these places in this section (497) the words used, when the author or maker of the estimate is intended, are words which in themselves can mean only one; and yet so obvious is the necessity for applying these provisions to a case where the bid is made by more than one, that the legal reading of it must, in each case, be made to include in its signification and interest the plural as well as the singular of these words. No one can doubt that this section requires that the estimate shall contain, (first,) the name and place of residence of the person, and the name and places of residence of the *persons*, if there be more than one person, &c. &c.; and (second,) that it shall contain the names of all persons interested with "him" or *them*, if the bid be made by more than one person. The next section of the ordinance (498) is the one above

quoted, which requires the verification of the estimate by the written oath of "the party" making it. Here the word "party" is used in speaking of the same being who, in the preceding section, is always spoken of as "person." Here, too, as there, it is quite certain that the author of the bid spoken of may be either one person or more, and the word "party" is intended to express one or more, as the bid may be made by one or more.

The word "person," in the preceding section, wherever it occurs, means one or more, and should be read "person or persons." The change of phraseology, in passing from that section to this, is the substitution of the word "party" in this, for the word "persons" in the preceding; and, as the word used to express the same meaning in the earlier section must evidently be read to signify one or more, so must its substitute or representative be so read, and "party" here means, and must be held to embrace, all the persons making it, be the number one or more. This section, then, requiring the verication of the estimate by the oath of the party making it, in effect, requires the verification of it by the oath of the party (person or persons) making it, whatever the number may be. The definite article before the word oath is more consistent with this than the opposing theory. If the section required only *an* oath of the party, it would be less definite, and if it required only verification by the party *on* oath, it might be more easily held that a single oath was sufficient. If it required that it should by *an* oath of the party making it, I should think that the oath of any one of several persons composing the party would certainly be sufficient. So the use of the same article before the word "party" tends to strengthen my view. The oath of a party would not so certainly mean the oath of more than one of several persons composing the party. I think that the language, "*the* oath of *the* party," naturally means more than the language, "oath of the party," and more than "an oath of the party;" and still more plainly, more than "an oath of a party," or "oath of a party."

In the view I have taken, it is not necessary to the decision of this motion, that I should consider the other reasons urged for refusing to entertain the bid

Whether the error was one of form or substance, may be somewhat doubtful, though I am inclined to think that the entire omission of the oath of a party, whose oath is required, is matter of substance; that the verbal statement of the objection, by the board, to Mr. Dinsmore, is a good notice to both, of the defect. The bill, I think, did not conform to the ordinance strictly, and as the rule established by precedents, by which I am bound, is *strictissimus*, I am compelled to refuse the peremptory *mandamus.*"

The relators appealed from that decision to the general term. Pending their appeal, the Croton Aqueduct Board having decided to award the contract to Fairchild & Co., the Messrs. Cumming applied at special term for a mandamus to compel the board *to award it* to them instead. This application was based upon the ground that the bid of Fairchild & Co. was fatally defective, in that the sureties offered were insufficient. The motion of Cumming & Cumming was ordered by the special term to be heard at the general term in the first instance;—and the appeal of Dinsmore & Wood from the order denying their mandamus, and the original motion of the Messrs. Cumming now came on to be heard together, by agreement of counsel.

Abbott Brothers and *C. O'Conor*, for Dinsmore & Wood.

R. Busteed and *Jas. R. Whiting*, for the Croton Aqueduct Board.

By the Court, MITCHELL, P. J. The first of these cases comes up on appeal from a decision made at special term, refusing a mandamus; the second is an original application for the same remedy, for other persons.

The People *v.* The Croton Aqueduct Board.

The Croton Aqueduct Board advertised for proposals for making a new reservoir. Dinsmore & Wood presented their proposals, and were apparently the lowest bidders. But the proposals were presented in the name of Dinsmore, Wood *& Co.*, when there was no third person in partnership with them. They were signed in the name of Dinsmore, and in the name of Wood, as well as in the name of Dinsmore, Wood *& Co.;* and no person made the necessary affidavit except Dinsmore. Wood made no affidavit. At the appointed hour and place the bids were opened by the board, sitting as such, and the comptroller being then present, as also Dinsmore and other contractors. The omission of Wood's affidavit was then noticed, and the bid of that firm was declared by the board defective, and on that account absolutely rejected by them. The fact of such rejection was publicly announced by the board, and notice thereof given on the spot, to Dinsmore. The defect was not supplied within twenty-four hours after this notice, nor until the 31st of the same month.

The ordinance organizing the departments of the corporation (§ 501) requires all bids to be rejected which are not furnished in conformity with sections 497, 498 and 499, and that thereupon the contract be awarded to the lowest bidder; but provides that no bid shall be rejected for any error of form, provided the persons making it shall correct the same and make it, in conformity with the ordinance, within twenty-four hours after notice of such defect.

The short time in which our decision is to be made, forbids our doing much more than stating our conclusions, without our reasons for them.

The notice required by the ordinance need not be in writing; the law implies that all notices should be in writing which form part of a judicial proceeding, but not those relating to the formation of contracts. The notice, although it pronounced the proposal fatally defective, was sufficient. It pointed out what the defect was, and then it was incumbent

on Dinsmore to judge for himself whether the defect could be cured or not.

The ordinance seems to recognize that there may be a departure from its requirements, which may be deemed an error of *form*, and that such error may be cured ; but it can hardly be, that under "error of *form*" would be included an utter neglect of *all* the required preliminaries. Preliminary matters were required of the bidders, with a view to prevent a violation of the laws and ordinances as to contracts ; laws and ordinances which were passed with the intention of excluding certain classes of persons from being interested in contracts, on the supposition that, if interested, they would have opportunities of gaining unfair advantages, and sometimes would authorize work to be done more because they would wish the profit of the contract, than from a belief that the public needed it. The exclusion of these persons was not a matter of form, and so the due proof which the ordinances required, that no such persons were interested, could not be a matter of form. The entire omission of that affidavit would be fatally defective.

There are other matters required by the ordinance, which are matters of convenience only, such as the residence of the person making the bid, the furnishing of the estimate to the *head* of the department, and at *his office.*

Section 497 requires the estimate to contain certain statements ; among others, that no member of the common council is interested ; and it is to state the names of all persons who are interested. It is to be verified by the oath of the party making the estimate. The party making the estimate was not Dinsmore or Wood alone, but both of them ; it was an appropriate use of the term "party" in this case, as it referred to a contract, in which those on each side or part of the contract are called parties or party. The object of the affidavit was like that of the old answer in chancery, to search the conscience of the *affiant ;* for this purpose the oath of each was equally necessary in both cases. It was not enough for one

alone to make his affidavit; that did not gain the object of the law—the searching of the conscience of the other.

To sustain a *mandamus*, the applicant must have a *clear legal right*. (*The People* v. *The Canal Board*, 13 *Barb.* 443. *People* v. *Supervisors of Columbia County*, 10 *Wend.* 365.) Has a bidder on proposals for estimates, any legal rights—any cause of action—until the contract is made with *him*, and approved by the common council? The mayor and common council represent the corporation of New York. As a general rule no corporation can be bound without its consent, manifested by an act of the corporate body. The same rule applies to the city of New York, unless an alteration has been made by the acts of 1849, 1853, and by the charter of 1857. Section 39 of the last act requires all *contracts* that are to be made by authority of the common council, to be *made* by the heads of departments *under such regulations* as shall be established by ordinances of the common council. So, when work is to be done, or supplies furnished to complete a particular job, and the expense together exceeds $250, it is to be by contract, under regulations established by ordinances of the common council, unless three-fourths of the members elected to each board order otherwise. All contracts are to be entered into by the heads of departments, and to be founded on sealed proposals, and to be given to the lowest bidder who gives security in the manner required by the ordinances, and the terms of whose contract must have been settled by the *corporation counsel* in previous specifications, prepared as a preliminary to his bid. Thus far, it does seem as if the heads of departments were assimilated to the heads of our state and national departments, who make contracts without the necessity of the legislature ratifying them; the legislature only ordering the contracts to be made, not making them. But the contracts in all these cases are to be made under regulations established by ordinances of the corporation. Section 32 of this act declares that the existing ordinances shall apply to the departments, so far as the same are applicable and not incon-

sistent with this act. Section 491 of the ordinances is consistent with the act, and forbids any contract to be made, signed or executed, for a sum exceeding $250, until all the proposals, estimates, contracts, and papers relating thereto shall have been laid before the common council and *confirmed* by them, and an appropriation made therefor. The acts of 1849 and of 1853 were sufficiently similar to the act of 1857 to be guides as to the interpretation of the last; and the ordinance last quoted was deemed consistent with those acts. It is so, in fact: those acts gave power to the heads of departments to make contracts, in order to take the power of selecting a contractor from the common council; to throw an additional check on the making of contracts, not to take off any *check* which the corporation before held over them—not to throw into the hands of heads of departments the absolute right to make a contract which had been found to be dangerous when exercised by the common council *alone*. In the spirit of those laws the common council made this ordinance, (§ 494,) forbidding any contract to be made until it be *confirmed* by them, and an appropriation be made therefor. The common council thus retain a *veto* on all contracts; it cannot, of itself, make any; the heads of departments cannot make, sign, or execute any without the approval of the common council, but are the executive officers, who, when the work is ordered, are to originate the contracts, and complete them, when the common council confirms them. Before this is done by the common council, no contract is made, and no right of action arises in favor of any contractor. The common council may consider all the bids too high, and refuse to have the work done at such prices; they may find such a change in their finances between the first suggestion of the work and the presentment of the bids, that what was prudent at the first period may have become wasteful extravagance at the last. They may have no funds to appropriate for such purposes, or the lowest bid may far exceed the sums which the law allows them to appropriate: for these and other reasons, the power

is reserved to them, who are to incur and pay the debt, to decide whether they will incur it or not, when the lowest price for which it can be done is presented to them. Besides, these various laws were made, not to give a right to the lowest bidder to have a contract made with him; they were not made for his benefit, but for the benefit of the public alone, and that the public might have the work done at the lowest price.

In this view of the law, the lowest bidder has no cause of action, if the work should now be done; nor any remedy against the corporation; if the work is given to another, although a higher bidder. The officers giving the contract to a higher bidder might, perhaps, be responsible, and the corporation might be exempt from any payment beyond the lowest bid, and in those respects the law would be defective.

This last objection applies to the motions in both cases. The order denying the mandamus in the first case should be affirmed with costs; the motion in the second case, for a mandamus, should be denied with costs.

[New York General Term, December 26, 1857. *Mitchell, Roosevelt* and *Clerke*, Justices.]

26 252
23a 394

Moultrie and others, *appellants, vs.* Hunt, *respondent.*

In 1849, H. being a resident of, and domiciled at, Charleston, S. C., made his will in the presence of three witnesses, executed in the form required by the laws of South Carolina, but not according to our laws, inasmuch as he omitted to declare it to the witnesses to be his will. In the year 1854 he removed to the city of New York, and died there. *Held* that the will was valid as a will of personal estate, and was properly admitted to probate as such.

As respects wills of personal estate, the place of execution is to give the law, as to the formality of execution.

APPEAL from a decree of the surrogate of New York, admitting to probate the last will and testament of Benjamin F. Hunt, as a will of personal estate.

M. G. Harrington, for the appellants.

David P. Hall, for the respondent.

By the Court, MITCHELL, P. J. Benjamin F. Hunt in 1849 was a resident of, and domiciled in, Charleston, S. C. He made his will in the presence of three witnesses, executed in the form required by the laws of South Carolina, but not according to our laws, as he omitted to declare it to the witnesses to be his will. He afterwards, in the year 1854, removed to the city of New York, and died here. The surrogate of this county admitted the will to probate as a will of personal estate, but not as a will of real estate. The appellants appeal from the first part of that decision. The principle held by the surrogate is that the validity of a will, so far as regards the capacity of the testator, is to be determined by the domicil of the testator, when he dies, and also as to some other matters; but as to the forms of execution, by the law of the place of execution, *lex loci regit actum.* In this distinction he is sustained by the authorities under the civil law, so far as we have been able to examine them. He is opposed by Judge Story, who, it is alleged, relied on authorities as to the capacity of the testator, as if they related to the formality of the instrument. He also seems to consider the English authorities as adopting a different rule. In this view of the law, Judge Story and the English authorities would be one way, and the authorities under the civil law the other. There was a conflict which it was expedient the legislature should settle, and any language of theirs, which, although somewhat ambiguous, may fairly be deemed as covering the question, should be considered controlling, by our courts. The *opinion* of the chancellor was that a will is valid as to personal estate, whether made in its forms according to the law of the domicil of the testator or the law of the place of its execution; and so he understood our revised statutes. (*See* 8 *Paige*, 524, 5, 6, *in matter of C. Roberts' will.*) The revised statutes, as amended in 1830, (2 *R. S.* 2*d*

ed. p. 12, § 63, *&c.*) authorized the proof of wills to be made under a commission to issue out of chancery, when they were made *according to our laws*, and the witnesses resided out of this state. This applied as well to real as to personal estate. (§ 67.) They also authorized "wills of *personal* estate duly executed by *persons residing* out of this state, according to the laws of the state or country, in which *the same were made*," to be proved in like manner. And when "a will so executed should have been duly admitted to probate in such state or country," they allowed letters testamentary to be granted on it here, on the production of the exemplification of the will. (§ 60.) They also declared that no will of *personal* estate *made out of this state*, by a person not being a citizen of this state, shall be admitted to probate, unless it shall have been executed according to the laws of the state or country in which *it was made.* (§ 69.) The laws of 1840, *ch.* 384, § 2, also allow "a will of *personal* estate duly executed in this state, by a person not a resident of this state," when first proved in a foreign state, to be proved here on the presentation of an exemplification. The provision first quoted, applied as well to *real* as to personal estate, and it therefore did not allow a probate unless the will were executed according to our laws. The next provision applied only to *personal* estate, and therefore gave effect to such wills *not made according to our statute*, if duly executed by persons *residing out* of this state, according to the laws of the state or country in which the same were made; but declared that no such will should be admitted to probate if "made out of this state by a person not being a citizen of this state," unless executed according to the laws of the state or country in which it was *made.*

The statute seems by implication to exclude from its benefits a citizen of this state temporarily absent from the state, perhaps under the notion that he must know what the law of his own state is—and comply with it—or he cannot avail himself of the disposing power which our law gives him. It clearly applies to all who are residing out of this state. The

appellant says, this means residing out of the state at the time of their death. But this is contrary to the language used. No time of residence is mentioned in the statute, except that which is to be inferred from the use of the participle residing, in connection with the execution of the will. In the phrase, "wills of personal estate executed by persons residing out of the state," if the question is asked "when residing?" no answer can be derived from the sentence alone, but one—the time previously referred to—residing at the time when it was executed. Then it is to be admitted to probate if executed according to the laws of the place where it was *made;* not according to the laws of the domicil of death. So section 69 refers also to the time of execution, when it says "no will of personal estate made out of this state by a person not being a citizen of this state"—that is, not being a citizen when it is made—and it excludes the law of his domicil as to the *form* of execution, by declaring that it "shall not be admitted to probate unless it be executed according to the laws of the state or country in which it is *made.*"

The act of 1840 is also on the principle that the place of execution is to give the law as to the formality of execution, for it allows a will of a non-resident duly executed in this state, and proved abroad, to be admitted to probate here on an exemplification. The test is as to execution—"duly executed in this state." That implies that it was executed here according to our laws. The result of these statutory provisions, so far as they concern personal estate, is, that in each of them the test of the due execution of a will as to its forms, when it is offered for probate in our state, is conformity to our laws, or to the laws of the state where it was executed, whether executed here or in a foreign state. And it is fairly to be inferred that the legislature, aware of the diversity of rules prevailing in different countries, chose to adopt the rule most common in countries where the civil law prevails.

By our law, this will was good as to personal estate, when it was made in 1849, the testator being then a resident of

Charleston. It would have been unquestionably valid here, if he had continued to reside there. There is no law of ours declaring that a change of domicil shall make void or revoke a will previously valid; and there is no reason why such a change should have that effect. Especially is this so in our country, where our citizens change from one state to another more readily than in any other part of the world; still feeling that with all the changes they have but one country—and generally similar laws—and not realizing that in some respects they pass under a new system. But few could conceive that whenever they change their domicil, they must consult the laws of their new home to know if a will perfectly valid when they left their former home, was in conformity with the new laws to which they had submitted.

The decree of the surrogate, admitting the will to probate as a will of personal estate, should be affirmed with costs.

[New York General Term, December 28, 1857. *Mitchell, Davies* and *Clerke*, Justices.]

26 256
77a 149

Latham *vs.* Westervelt.

The non-imprisonment act of 1831 does not require any written application for a warrant of arrest. None therefore is necessary; and if one be used, it need not be addressed or signed. The affidavit mentioned in section 3 of the act, is all that is necessary.

When a debtor is brought before the judge, on a warrant of arrest, no recognizance need be taken for his appearance at the adjourned day. The officer arresting him is bound to bring him before the judge, and to *keep him* in custody until he shall be duly discharged, or committed. And if no recognizance is taken, he is bound to keep him in his custody; and will be answerable if he escapes.

For an escape from arrest on a warrant issued under the non-imprisonment act, the rule of damages is, that the sheriff is *prima facie* liable for the amount of the judgment. But if it is shown that the debtor was unable to pay his debts, the jury should be instructed to give only such damages as the plaintiff has sustained by the escape.

An application for a warrant of arrest, under the non-imprisonment act, may be made to any judge of the court in which the suit was brought; whether

the judgment has been docketed in the county of the judge's residence, or not.

Where the affidavit, on which an application for a warrant of arrest was founded, alleged that the defendant was justly indebted to the applicant in a specified sum, with interest since, &c., upon a judgment rendered in the supreme court, in favor of the plaintiff, against the defendant, docketed with the clerk of the county of A. on &c., for $2668.18 damages and costs, which judgment was founded on an express contract, for which the defendant could not be arrested; and among other things, that the defendant had rights in action, debts and demands which he refused to apply to the payment of the judgment; *Held* that this was a sufficient statement of facts to give the judge jurisdiction; and that it was not necessary for the plaintiff to set forth what the original cause of action was.

MOTION for a new trial; founded on exceptions taken at the circuit. The facts are presented in the opinion.

Wm. Barnes, for the plaintiff.

A. J. Vanderpoel, for the defendant.

By the Court, MITCHELL, P. J. This case was before the general term once before, and is reported in 16 *Barb.* 421; the court then setting aside a nonsuit. A new trial has been had, and resulted in favor of the plaintiff. The case now comes again before the court on exceptions. The action is brought against the defendant as sheriff of New York, to recover damages on account of the escape of Daniel A. Van Namee from his custody, after he had been arrested by order of Justice Edmonds, on behalf of Latham, under the non-imprisonment act of 1831. Objections are made; 1st. That the affidavits presented to the justice did not show facts enough to give him jurisdiction; 2d. That the judgment not having been docketed in the city of New York and having been obtained in Albany, the judge had no power to act; 3d. That the application for the warrant was not addressed to the justice, or signed; 4th. That when the prisoner was first taken before the justice no recognizance was taken for his appearance at the adjourned day; 5th. That the court excluded the defendant's testimony that Bernel was the regular deputy of the

sheriff to serve the warrant, and he not being able to go, a person was, at the request of the plaintiff, deputed by the sheriff to serve the warrant; and that Mr. Stewart (who had the prisoner in charge) was the person; 6th. That the court should only have allowed nominal damages to the plaintiff.

To some of these objections a short answer may be given, and those objections will be noticed first.

(3.) The non-imprisonment act does not require any *written application* for a warrant. None therefore is necessary; and if one be used it need not be addressed or signed. The act allows the creditor to "apply to any judge of the court in which the suit was brought," for a warrant to arrest the defendant, (§ 3,) and then prescribes the requisites to its issuing. "No such warrant shall issue unless satisfactory evidence be adduced to such officer, by the affidavit of the plaintiff or of some other person," &c. That affidavit is alone made necessary.

(4.) The fourth objection was decided against the defendant before; the statute (§ 6) requiring the officer arresting the debtor "to bring him before the judge issuing the warrant, and to *keep him* in custody until he shall be duly discharged, or committed as hereinafter provided." If no recognizance were taken, the sheriff could not be excused under that law for not "*keeping*" the debtor in his custody, or for suffering an escape.

(5.) The defendant did not offer to prove that a person was selected by the *plaintiff* to execute the warrant as his agent; but that one of the regular deputies of the sheriff not being able to attend to the business, the sheriff, at the request of the plaintiff, appointed another person as his special deputy. There was no offer to prove that this person was named by the plaintiff, or was known to him: he was not therefore the plaintiff's agent, but the agent of the sheriff.

(6.) For an escape from an execution, or on attachment for non-payment of costs, the sheriff is liable for the whole debt; but for an escape from custody on *mesne process* and other proceedings, he is liable to the extent of the damages sustained

by the creditor. (2 *R. S.* 437.) The court charged that the rule of damages was that the sheriff was *prima facie* liable for the amount of the judgment; but as the defendant had given evidence of Van Namee's inability to pay his debts, the jury should give only such damage as the plaintiff had sustained by the escape. This conforms to the above statute and to *Patterson* v. *Westervelt*, (17 *Wend.* 543.)

(2.) The judgment was recovered in the supreme court of this state, in October, 1848, and docketed in Albany; the warrant was obtained in the city of New York, where the defendant resided, but the judgment was not docketed in the latter city. The act of 1818, *ch.* 48, authorized applications for a warrant under the non-imprisonment act of 1831 to be "made to *any* judge of a court of record in *any* county in which the judgment, on which the complaint is grounded, is *docketed*, and in which the defendant resides." This was an enabling act, and extended the right to issue the warrant to *any judge* of a court of record in the county in which the judgment was docketed and the defendant resided, although the judge should *not* be of the supreme court, or of the court in which the judgment was obtained. The act of 1831 (§ 3) only allowed the application to be made to a judge of the *court* in which the suit was brought, or to an officer authorized to perform the duties of *such* judge. Under it a judge of a county court could not take cognizance of these matters if the judgment were obtained in any other court than his own, unless he was a commissioner appointed to perform the duties of such other court. The act of 1848 repealed no part of the act of 1831, but extended the jurisdiction to another class of judges—to judges not of the court in which the judgment was obtained. This latter class could act only if the judgment were docketed in their county. But the act of 1831, allowing the application to be made to any judge of the court in which the suit was brought, remained in full force and unaltered; so that such judge could act, whether the judgment were *docketed* in the county in which he (the judge) was, or not.

(1.) The first objection remains to be considered. The plaintiff's affidavit alleged that Van Namee was justly indebted to him in the sum of, &c., and interest since 30th October, 1848, upon a judgment rendered in the supreme court of this state in favor of the plaintiff, against Van Namee, docketed with the clerk of the county of Albany on the 30th October, 1848, for $2668.18 damages and costs, which judgment was founded upon an express contract, and for which demand and for which judgment Van Namee could not be arrested, &c.; and among other things, that Van Namee then had rights in action, debts and demands which he refused to apply to the payment of the judgment. The defendant objects that this is not a statement of facts, but of conclusions of law, and that the plaintiff should have set out what the original cause of action was on which the judgment was obtained, that the court might judge if it was on contract, or if it was on the causes of action excepted by section 2 of the act. The general rule is that a party is to state facts, and not conclusions of law, in a pleading or a summary proceeding. The question is, how is that rule to be applied, and what, within the meaning of it, is a statement of facts. Usually (and it may be said always) in an indictment—the most precise of all pleadings—it is sufficient to follow the words of the statute, on which the indictment is founded. On summary proceedings there is no reason for requiring a greater particularity of statement, than on an indictment, except that in matters in which an interest is to be established, that being a matter of *inference* only to be drawn from other facts to be stated, those facts must be stated: and there may be other similar exceptions.

So in these cases, it is not enough to allege that the judgment debtor is indebted on a claim for which he, according to the provisions of the act of 1831, cannot be arrested or imprisoned. That would be stating an inference of law, without furnishing the facts on which it was grounded. But here the plaintiff did furnish satisfactory evidence that there was a *debt* due to him from the defendant, amounting to more than $50.

and specified the nature and amount thereof as the 4th section first requires, when he showed that the defendant was indebted on a judgment for a certain sum recovered on a certain day. The judgment was the debt due. The statement of the judgment, and that it was recovered on an express contract, was a statement also of the *nature* of the debt. The statute does not require the origin of the debt, or its particulars, to be proved. Then to show by facts that the action was one on which the defendant could not be arrested under the first section of the act of 1831, the plaintiff also proved by his affidavit that the judgment obtained by him was "founded upon an express contract." The first section prohibits an arrest or imprisonment on civil process in any suit for the recovery of money due upon *any contract*, express or implied. The affidavit was as full as the statute, and followed its language. To allege that a contract was made is to allege a fact; and it is for a jury, and not for the court, to decide whether one was made or not. To determine what the contract means requires a statement of its particulars, and as nearly as may be of its words or language. That is a question of law, and is for the court to decide; and therefore when the question is what does the contract mean, the particulars of the contract must be set out; but when the question is whether the action was on a contract or for a tort, any layman may testify to it as a fact. The second section declares that the first shall not extend to actions for fines or penalties, or on promises to marry, or for moneys collected by a public officer, &c. This is not a part of the first section, nor even a proviso or exception *in form* to it; but a separate clause intended to interpret the first, and to prevent its "*extension*" to cases to which it was not intended to be applied. In such cases, in pleading, it is unnecessary to notice the qualifying part of the statute: it devolves on the opposite party to show it. The same rule should be applied here; and as the affidavit is as broad in its language as that used in the prohibitory section of the act, it must be deemed coextensive with it.

The 4th section of the act of 1831 required the above proof. The 5th section then proceeds as follows: "Upon such proof being made, to the satisfaction of the officer, &c. he shall issue the warrant." No other proof than this was necessary. In the fourth edition of the revised statutes the introduction of some amendments to the act of 1831, made in subsequent years, may lead to some confusion, but not if the dates of the several enactments are observed.

The judgment for the plaintiff should be affirmed, with costs.

[New York General Term, December 30, 1857. *Mitchell, Clerke* and *Davies*, Justices.]

26 262
24h 650
40h 137

Lowber *vs.* The Mayor &c. of the City of New York.

The supreme court has the power to exercise such an efficient control over every proceeding in an action pending in it, as effectually to protect every person interested in the result, from injustice and fraud; and it will not allow itself to be made the instrument of wrong.

As a general rule, none but the parties to an action will be allowed to meddle with its management, or will be recognized as having any standing in court in relation to it.

But the comptroller of the city of New York, being a tax-payer and an officer of the corporation, having charge of its financial concerns, may move to have a judgment alleged to have been recovered against the city through collusion with, and by consent of, the city officials, set aside and vacated. Peabody, J., dissented.

THIS was an appeal, by the plaintiff, from an order made at a special term, vacating a judgment for about $200,000, er ed against the Mayor &c. of the city of New York, in fa of the plaintiff. Upon an affidavit stating fraud and col sion in the entering up of the judgment, upon a *quasi* confession, signed by the defendant's attorney, A. C. Flagg, the comptroller of the city, applied to one of the judges of the court and obtained an order to stay all further proceedings,

and to compel the parties to show cause why the judgment so entered should not be set aside and the defendants be allowed to make a defense to the action. On the day appointed, cause was shown before Justice Roosevelt, at a special term; who, after hearing arguments of counsel, granted the order appealed from.

John M. Barbour, *D. Dudley Field*, and *Wm. Curtis Noyes*, for the appellant

James R. Whiting, for the respondents.

CLERKE, J. I presume that it will not be disputed, even by the counsel for the plaintiff, that it belongs to the essential, inherent powers of this court to exercise such an efficient control over every proceeding in an action pending in it, as effectually to protect every person actually interested in the result, from injustice and fraud; and that it will not allow itself to be made the instrument of wrong, no less on account of its detestation of every thing conducive to wrong, than on account of that regard which it is proper it should entertain for it own character and dignity. And it will not only rectify proceedings of this nature, when brought to its notice by the intervention of any person having an interest in the result, whether formally a party to the action or not, but it is the solemn duty of every judge upon the bench to employ a vigilant eye, without waiting for the suggestions of others, for the purpose of avoiding and detecting the perpetration of wrong which may be attempted by the instrumentality of legal forms. And this vigilance should be exercised through every stage of the action, from the issuing of the summons to the levying of the execution. This superintendence and this exercise of power should indeed be regulated by a sound discretion and with the utmost caution. Rules, and orders, and decisions of the court, deliberately made, should not lightly be disturbed. As a general rule, none but the parties to an action

will be allowed to meddle with its management, or will be recognized as having any standing in court in relation to it. When the litigants consist of adults not under restraint, and not insane, acting in their own right, the presumption that every man is the proper director of his own interests, and the serious inconvenience that would ensue from allowing the unsolicited interference of persons not interested, render it expedient that the court shall lend no attention to any but the parties on the record. But even this rule must yield to the circumstances of the case. Even adult parties, apparently acting in their own right, and presenting themselves apparently in the adverse position of plaintiffs and defendants, may, by seeming to adjust only their mutual rights, compromise very seriously, and perhaps irrecoverably, the rights of others.

The familiar instance in the argument will at once present itself. Where one party confesses a judgment without consideration, or for too large an amount, or where it is not made in strict compliance with the directions of the code, the judgment will be set aside on the application of a party not named on the record, but who is a creditor of the defendant. Now, on what principle is this interference allowed? Is it merely because the moving party has also obtained a judgment against the defendant? Even if this were the precise reason, it would be a very palpable instance of recognizing the right of a person not a party to the record, to claim the interposition of the court in regard to it; but the reason of allowing this has no such restricted limits. In the particular instance referred to, indeed, the court will only hearken to a judgment creditor; because it is expedient to have his claim judicially established, before it will be judicially recognized. But the broad reason for the interference of the court is, that the plaintiff and defendant, in the fraudulent confession of judgment, have by their combined action employed its forms to accomplish an act which affects the interests of persons having an interest in the disposition of the property

affected by the judgment, and whenever this is done, the court has the essential inherent power to interfere, although, as a general rule, as I have said, in order to avoid confusion and contention, it will not do so where the parties to the record are adults, acting in their own rights, and are free from restraint.

On the general principle which I have stated, the court would never allow a trustee to concede away any portion of the trust estate without ample consideration; and if he were a defendant in an action, and was about compromising the rights of his *cestui que trust* by a confession, by letting a judgment go by default, or by carelessness, or even by a palpably mistaken view of his duty, the court, at the instance of the person having the beneficial interest in the controversy, would interpose. The power of a trustee over the estate vested in him exists only for the benefit of the *cestui que trust;* and in equity, trusts are so regarded that no act of a trustee will be recognized as valid, which is calculated to prejudice the *cestui que trust*, although a purchaser without notice will be protected. Courts are equally jealous in watching all the acts of a trustee by which the interests of the trust may be compromised. The instances quoted by the plaintiff's counsel, in which the court refused to recognize the acts of unauthorized persons to bind parties to a suit, have no application to this case. If the comptroller attempted, during the progress of the suit, to consent, of his own accord, to a reference or an arbitration without any authority from the defendants, of course the consent would not be binding on them, and would be entirely void; but by this application he does no such thing. As a tax-payer, and as an officer of the corporation, particularly identified with the administration of its financial concerns, he presents himself before this court, and informs us that the defendants, who are, in fact, the mere trustees of the property and the other interests of the people of this municipality, the corporators of whom it is composed are, by their conduct in relation to the plaintiff's demand,

wasting the property of their *cestui que trust.* It is not necessary to suppose that this is a case of bribery or corruption on the part of the individual members of the common council, or of any other officers of the city government, or that the council of the corporation has intentionally betrayed the city. It requires much stronger proof than I have discovered in the papers before me, to induce me to believe that he for a moment contemplated any injury to his constituents. That officer, and even the members of the common council, may be sincerely of opinion that to litigate this claim would involve the city in considerable expense, without any reasonable hope of ultimate success; and, indeed, that seems to be the conviction of many others who cannot be suspected of any other unworthy motive to influence their opinion. But it is enough for us, on this appeal, to be convinced that the court below had the power to interfere, and that the evidence of the facts on which it might rightfully interfere is such, that if they had been presented to a jury, and the jury had found the same way, their verdict would be sustained. The title of the plaintiff had been condemned by one court as to part of the property to be sold, and is now subject to doubts which can be removed only by a judicial investigation. On the evidence a jury might have found, as the court below has, that the value of the property was excessively overrated. The objections that by the terms of the resolution of the corporation, the contract was not then completed, but was to be made in form by the comptroller, also deserves consideration.

These matters seem to have been overlooked at the trial. As they should be re-examined, we express no formal opinion upon them. The form of the judgment is also incorrect. The payment by the defendants should have been required on the plaintiff's executing and delivering to the defendants, (or filing in court for them, if they refuse to receive it,) a warranty deed of the premises, free from all incumbrances, except as excepted in the contract, and with a good title in all other respects. Justice to all parties would be best promoted by

modifying the order below, and allowing the answer and subsequent proceedings to be set aside, provided the comptroller, or any other tax-payer who may be substituted in his place, shall, within thirty days after receiving a written notice of the entry of this modified order, file an original complaint as a tax-payer, corporator or otherwise, on behalf of himself and others, setting forth such matters, and making such parties, and praying such relief in the premises, as he may be advised. In the meantime let the plaintiff's proceedings in this action be stayed; and if another suit shall be commenced, as above provided for, let the plaintiff's proceedings be further stayed until the final decree in the other suit. Let the plaintiff in the new suit give security in the amount of $5000.

MITCHELL, P. J., concurred.

PEABODY, J., (dissenting.) If there is any evidence of fraud or collusion in this case, there certainly is none connecting the plaintiff with it. The circumstances of suspicion attach only to the acts of others, to which he was not necessarily, and is not shown to have been, a party. I think, however, that there is no satisfactory evidence of fraud or collusion on the part of any one, not even of those with whom he dealt; and in this, as I understand the opinion of my brethren, I concur with them. I am unable, however, to proceed with them to the conclusion at which they have arrived. The question of fraud and collusion being disposed of, the only one remaining is that of error in the judgment; and whether there be or be not error, is a question which cannot be tried in this manner. It can properly be tried on an appeal from the judgment, and only in that manner. But if the relief asked could properly be had on motion, it could be had only on the application of a party to the record, against whom the erroneous judgment was rendered. If in a suit by A. against B., injustice be done the latter by judgment therein,

he alone can have relief against it. Whether the remedy be by appeal or by motion, the party injured alone is entitled to it; and an application on behalf of a third person, not a party to the proceedings, cannot properly be entertained. Mr. Flagg, in contemplation of law, is a stranger to this suit. His official relation to the city gives him no right here, and he has no standing in court to make this motion.

The city might make it if it desired to, and would be entitled to be respectfully heard on the merits; and if it produced only the same evidence which is now before us on the motion of Mr. Flagg, it would be entitled only to have it respectfully denied.

It has been said that a corporator and tax-payer can maintain an action in such a case on behalf of himself and others, corporators and tax-payers, similarly related to the subject of the litigation; and the doctrine has the sanction of several cases in this court: all of them, however, in this district, and all of them relating to the corporation of the city of New York. Whether this doctrine will ever receive the sanction of a court beyond the boundaries of this judicial district, and whether in this district it will ever be sustained as to any corporation except that of the city of New York, (most worthy and most wronged,) may very well be doubted. The weight of judicial authority, even here, is not decidedly in its favor, as is shown by the very masterly review of the cases by Mr. O'Conor, in the case of *Wetmore* v. *Story*, (22 *Barb.* 447.)

The most that can be said in favor of it, in the light that he has thrown on the subject, is that the proposition finds some support, but is left in doubt on authority, even here. But that doctrine, if sustained, is far from affording sanction to a proceeding like this. That a person not a party to a judgment, but only remotely, and to a very trifling extent, interested in its consequences, may, in the absence of fraud or collusion, without the assent of either party to it, and in spite of their combined opposition, in a suit even in his own name, set it aside, not only as to himself, but as to thou-

sands of others similarly situated, without the co-operation, or even consent, of any one of them, is a doctrine which, if it be law, is certainly not to be extended on any slight provocation. But when such a person asks, without the formality or responsibility of a suit in his own name even, to thrust himself between the plaintiff and defendant in the original suit, and on a motion against both, and in spite of their strenuous resistance, to have a judgment set aside for his own convenience or pleasure, a new position is taken; a novel attitude surely is assumed, and one hitherto unknown to the course and practice of the law. There is no claim of any precedent for this proceeding. But it may be said that the novelty of the case is but a feeble argument against it; and such a remark, I fear, is not inconsistent with the spirit of the times. My own opinion, however, will not affect the result in this case; and with a consciousness of this, and in the absence of any urgent reason to wander therefrom, I must be excused the indulgence of a desire, (eccentric though it may be,) to keep within a path hitherto not entirely untrodden, but which has at least been explored; and within sight of some of the recognized landmarks of the law.

I think that the order of the court below should be reversed and the motion denied, and that the judgment originally entered should be allowed to stand—at least until some party to it shall arise to question it.

Order modified.

[New York General Term, December 7, 1857. *Mitchell, Clerke* and *Peabody*, Justices.]

JONATHAN LEMMON, plaintiff in error, *vs.* THE PEOPLE, *ex rel.* Louis Napoleon, defendant in error.

L., a citizen of Virginia, being the owner of eight slaves, arrived with them in a steamer, at New York, with the intention of transhipping them there for Texas, whither he was going to reside; and meaning to remain in New York only until a vessel could be procured, to continue their journey. The slaves were landed, and the next day were brought before the court by *habeas corpus*. *Held* that under the existing laws they were free, and were entitled to be discharged.

Comity does not require any state to extend any greater privileges to the citizens of another state than it grants to its own. As the state of New York does not allow its own citizens to bring a slave here, even *in transitu*, and to hold him as a slave, for any portion of time, it cannot be expected to allow the citizens of another state to do so. *Per* MITCHELL, P. J.

The clause of the constitution of the United States giving to congress power to regulate commerce with foreign nations and among the several states, and with the indian tribes, confers no power on congress to declare the *status* which any person shall sustain while in any state of the union.

This power belonged, originally, to each state, by virtue of its sovereign and independent character, and has never been surrendered. It is therefore retained by each state, and may be exercised as well in relation to persons *in transitu* as in relation to those remaining in the state.

The power to regulate commerce may be exercised over individuals as passengers, only while on the ocean, and until they come under state jurisdiction. It ceases when the voyage ends, and then the state laws control.

THIS is a writ of *certiorari* issued out of this court, for the purpose of reviewing an order made November 13, 1852, by the Hon. Elijah Paine, then a justice of the superior court of the city of New York, upon a habeas corpus allowed by him, to inquire touching the detention of eight colored persons, to wit: one man, two women and five children. Jonathan Lemmon, the plaintiff, having been served with said habeas corpus, made a return thereto, which stated that Juliet Lemmon, the plaintiff's wife, was and had been for several years a citizen and resident of the state of Virginia; that the said eight persons were her slaves, inherited and owned by her, and held to labor by her as her slaves in that state, under and by virtue of the laws thereof; that intending to go with her said slaves from Virginia to the state of Texas as an ulti-

mate destination, she necessarily took passage with her said slaves on board a certain steamship called the City of Richmond, at Norfolk, in the state of Virginia, bound for the state of Texas aforesaid; that by the laws of Texas, she, the said Juliet, was and would be entitled to the said slaves and to their service or labor, in like manner as she was entitled to the same by the laws of Virginia; that she was compelled by necessity to touch or land at the harbor of New York, without remaining or intending to remain longer than necessary; that she did not bring the said slaves into the state of New York to remain therein, or in any manner or for any purpose whatever, except *in transitu* from the state of Virginia to the state of Texas as aforesaid, through the port or harbor of New York, on board of said steamship; that the said slaves so passing from Norfolk on board said steamship never touched, landed in, or came into the harbor of New York, except for the mere purpose of such passage as aforesaid; and that the said Juliet Lemmon was so on her way, *in transitu* as aforesaid, with the said eight slaves in her custody and possession when, on the 6th day of November, 1852, the said writ of habeas corpus was served upon her.

The relator demurred to the return, on the ground that the facts stated in it did not constitute a legal cause for the restraint of the liberty of the colored persons; and after argument, Justice Paine, by his final order, dated November 13, 1852, liberated them from Mrs. Lemmon's custody, and ordered them to be set at liberty. See the case below, 5 *Sand. S. C. R.* 681.

This method of review (by certiorari) is regulated by the revised statutes. (*Part* 3, *ch.* 9, *tit.* 1, *art.* 2, § 69, *&c.*)

H. D. Lapaugh and *C. O'Conor*, for the plaintiff in error. I. The ancient general or common law of this state authorized the holding of negroes as slaves therein. The judiciary never had any constitutional power to annul, repeal or set aside this law; and, consequently, it is only by force of some positive

enactment of the legislative authority, that one coming into our territory with such slaves in his lawful possession could suffer any loss or diminution of his title to them as his property.

II. The unconstitutional and revolutionary anti-slavery resolutions of April, 1857, cannot retroact so as to affect this case. Prior to that time, no legislative act of this state had ever declared, that to breathe our air or touch our soil should work emancipation, *ipso facto;* nor had any statute been enacted which, by its true interpretation, denied to our fellow citizens of other states an uninterrupted *transitus* through our territory with their negro slaves. (1.) Independently of the special injunctions and guaranties of the federal constitution, the comity between the states of the American union should be, and upon the true principles of inter-state jurisprudence is, of the most intimate and cordial kind. (2.) Inter-state comity, in its simplest form, awards a free transit to members of a friendly state with their families and rights of property, without disturbance of their domestic relations. (*Curtis' Arg.* 18 *Pick.* 195, *and cases cited.* 5 *Sand.* 710. 4 *Scam.* 467, 468.) (3.) Whatever others may do, no American judge can pronounce slave property an exception to this rule, upon the general ground that slavery is immoral or unjust. Every American citizen is bound by the constitution of the United States to regard it as being free from any moral taint which could affect its claims to legal recognition and protection, so long as any state in the union shall uphold it. (4.) The words "imported, introduced, or brought *into* this state," in the statute, (2 *R. S. part* 1, *tit.* 7, §§ 1, 16,) unless extended in a manner violative of all the principles above contended for, and beyond their fair import, do not apply to the *transitus* of a slave in custody of his owner, an American citizen, quietly passing through this state on lawful occasion and without unnecessary delay.

III. The state of New York cannot restrain a citizen of the United States from peaceably passing through her territory with his slaves or other property, on a lawful visit to a state

where slavery is allowed by law. (1.) Congress has power "to regulate commerce with foreign nations, and among the several states and with the indian tribes." (*Const. U. S., art.* 1, § 8, *subd.* 3.) (2.) This power is absolutely exclusive in congress, so that no state can constitutionally enact any regulation of commerce between the states, *whether congress has exercised the same power over* the matter in question or left it free. (*Passenger cases*, 7 *How. U. S. R.* 572. *Id.* 400, *per McLean, J. Id.* 410, 431, *per Wayne, J., and the Court. Id.* 455, *per McKinley, J. City of New York* v. *Miln*, 11 *Peters*, 158, 159, 156, *per Story, J.* 7 *Cushing*, 299, 317, *Sim's case, per Shaw, Ch. J.*) At all events, the states have not reserved the right to prohibit and thus destroy commerce or any portion of it. The proposition involved in this case is that a citizen of Virginia, in possession of his slave property, cannot pass through the navigable waters of a non-slaveholding state on board of a coasting steamer enrolled and licensed under the laws of congress, without having his vessel arrested under state law, and his property torn from him by force of Lord Mansfield's *obiter dictum* in *Somersett's case*, 2 *Hagg.* 107. (*Gibbons* v. *Ogden*, 9 *Wheaton*, 1. *Com.* v. *Fitzgerald*, 7 *Law Rep.* 381.) The case in 1 *Parker's Cr. Cas.* 69, (*In Re Kirk,*) cannot be upheld. The proposition cannot be maintained. Each state is required to give full faith and credit to the public acts of every other. (*Art.* 4, § 1.) To surrender to every other, fugitives from its justice, or from any personal duty. (*Art.* 4, § 2, *subd.* 2, 3.) No privilege or immunity belonging to a citizen of one state can be invaded by any other state. (*Id.* § 1.) Commerce between the states is placed under the exclusive control of congress. (*Art.* 1, § 8, *subd.* 3.) And congress itself is forbidden to impose any burthen on the external trade of a particular state, or to burthen or prefer it in any way. (*Const. art.* 1, § 8, *subd.* 2; § 9, *subd.* 5.) It seems to have been universally conceded until the present case, and, at all events, it is clear in law, that a citizen of any state in the union may

freely pass through an intermediate state to the territory of a third without sacrificing any of his rights. (18 *Pick*, 224, 5, *per Shaw, Ch. J. Willard* v. *People*, 4 *Scam.* 468, *per cur. Scwell's slaves*, 3 *Am. Jur.* 406, 7. 7 *How. U. S. R.* 461.) (3.) The word "commerce," as it is used in this constitutional grant of exclusive power to congress, includes the transportation of persons, and the whole subject of *intercourse* between our citizens of different states as well as between them and foreigners. Consequently, no state can impose duties, imposts or burthens of any kind, much less penal forfeitures, upon the citizens of other states for passing through her territories with their property, nor can any state interrupt or disturb them in such passage. (*Passenger cases*, 7 *Howard's U. S. R.* 572. *Id.* 401, 405, 407, *per McLean, J. Id.* 412, 413, 430, 432, 434, 435, *per Wayne, J., and by the court. Id.* 450, 451, *per Catron, J. Id.* 453, *per McKinley, J. Id.* 461 *to* 463, *4th point*, 464, *per Grier, J. Groves* v. *Slaughter*, 15 *Peters*, 510, 511, 513, 515, 516, *in point as to slaves, per Baldwin, J. See Argt. of Mr. Clay*, 15 *Peters*, 489; *Mr. Webster*, 495; *R. J Walker contra, appendix*, 48 *and onward. Gibbons* v. *Ogden*, 5 *Peters' Cond.* 567, *curia, per Marshall, J.*) (4.) This doctrine does not preclude a state from exercising absolute control over all trading of any kind within her borders; nor from any precautionary regulations for the preservation of her citizens or their property from contact with any person or thing which might be dangerous or injurious to their health, morals or safety. (7 *How.* 402, 403, 406, 408, *per McLean, J. Id.* 417, 424, 426 *to* 428, *per Wayne, J. Id.* 457, *per Grier, J.* 14 *Peters*, 615, *per Baldwin, J.* 16 *id.* 625, *per Story, J.* 5 *How.* 569, 570, 571. *Gibbons* v. *Ogden*, 9 *Wheat.* 1. 5 *Peters' Cond.* 578.)

IV. The constitutional guaranty to "the citizens of each state" that they "shall be entitled to all privileges and immunities of citizens in the several states," (*art.* 4, § 2, *subd.* 1,) affords the citizen of any state, peacefully passing through another, a right to immunity from such disturbance as the

plaintiff suffered from the order now under review. (1.) This section would lose much of its force and beneficial effect if it were construed to secure to the non-resident citizen in traveling through a state, only such "rights" as such state may allow to its own citizens. Its object was to exempt him from state power, not to subject him to it. (2.) The section is not to be thus narrowed. The constitution recognizes the legal character "citizen of the United States" as well as citizen of a particular state. (*Art.* 1, § 3, *subd.* 3; *art.* 2, § 1, *subd.* 5.) The latter term refers only to *domicil*, for every citizen of a particular state is a citizen of the United States. And the object of this section was to secure to the citizen, no matter in what state he might be domiciliated, the general privileges and immunities which, in the very nature of citizenship, as recognized and established by the federal constitution, belonged to that *status;* so that by no partial and adverse legislation of a state into which he might go as a stranger or a sojourner could he be deprived of them. It is a curb set upon state legislation, harmonizing with the provision which extends the ægis of the federal judiciary to the non-resident citizen in all controversies between him and the citizens of the state in which he may be temporarily placed. (*Const. art.* 3, § 2. *Per Curtis, J.*, 19 *How.* 580.) (3.) This section, like its brother in the judicial article, applies only to the stranger. The moment a citizen of Virginia, ceasing from his journey, sits down in the state of New York without the intent of leaving, or makes, in fact, any stay beyond the reasonable halt of a wayfarer, he becomes a citizen of New York, and relinquishes all benefit from these important guaranties of the federal constitution. (4.) By the comity of civilized nations, the stranger is allowed to pass through a friendly territory without molestation. Even belligerents are allowed to pass their armies over a friendly neutral territory. (*Vattel, b.* 3, *ch.* 7, §§ 119 *to* 127. *See Vattel, b.* 2, *ch.* 8, §§ 108 *to* 110; *ch.* 10, §§ 132 *to* 134.) The object of this section was to secure to the citizen of the United States all the general privileges and immunities of a

citizen of the United States, whilst temporarily and necessarily within a state other than that of his domicil. One of these is to be free from all burthens and taxation whatever, for, upon general principles, taxation is only imposed on residents or on dealings; another is to be free from local class legislation, for as a wayfarer he cannot be a member of any body of persons organized, governed or defined as a class under the state law. The words "privilege and immunity" are here used essentially, though perhaps not exclusively, in a passive sense. The object is not to compel states to give strangers the same "rights" which they award to their own citizens; but to exempt the stranger from burthens or obstructions of any kind. To stop his vessel or his carriage *in transitu* and carry off his negro servant—recognized as his property by the laws of his own state and the federal constitution—is a manifest invasion of his just "privileges and immunities."

V. The general doctrines of the court in Dred Scott's case must be maintained, their alleged novelty notwithstanding.

VI. It is highly fit that the court below should be corrected in the view which it has taken of this matter, since the doctrine laid down by it is inconsistent with the peace of this country and the rights of other states. (*Per Lord Stowell*, 1 *Dodson*, 99.)

W. M. Evarts, for the people. I. The writ of *habeas corpus* belongs of right to every person restrained of liberty within this state, under any pretense whatsoever, unless by certain judicial process of federal or state authority. (1 *R. S.* 563, § 21.) This right is absolute (1) against legislative invasion, and (2) against judicial discretion. (*Const. art* 1, § 4. 1 *R. S.* 565, § 31.) In behalf of a human being, restrained of liberty within this state, the writ, *by a legal necessity*, must issue. The office of the writ is to enlarge the person in whose behalf it issues, unless *legal cause* be shown for the restraint of liberty or its continuation; and enlargement of liberty, unless such cause to the contrary be shown, flows from the writ by

the same legal necessity that required the writ to be issued. (1 *R. S.* 567, § 39.)

II. The whole question in the case, then, is, does the relation of slave owner and slave, which subsisted in Virginia between Mrs. Lemmon and these persons while there, attend upon them while commorant within this state, in the course of travel from Virginia to Texas, so as to furnish "legal cause" for the restraint of liberty complained of, and so as to compel the authority and power of this state to sanction and maintain such restraint of liberty. (1.) Legal cause of restraint can be none other than an authority to maintain the restraint which has the force of law within this state. Nothing has, or can claim, the authority of law within this state, unless it proceeds, 1. From the sovereignty of the state, and is found in the constitution or statutes of the state, or in its unwritten common (or customary) law; or 2. From the federal government, whose constitution and statutes have the force of law within this state. So far as the *law of nations* has force within this state, and so far as "by comity" the *laws of other sovereignties* have force within this state, they derive their efficacy, not from their own vigor, but by administration as a part of the law of this state. (*Story's Confl. of Laws*, §§ 18, 20, 23, 25, 29, 33, 35, 37, 38. *Bank of Augusta* v. *Earle*, 13 *Peters*, 519, 589. *Dalrymple* v. *Dalrymple*, 2 *Hagg. Consist. R.* 59. *Dred Scott* v. *Sandford*, 19 *How.* 460, 1, 486, 7.) (2.) The constitution of the United States, and the federal statutes, give no law on the subject. The federal constitution, and legislation under it, have, in principle and theory, *no concern* with the domestic institutions, the social basis, the social relations, the civil conditions, which obtain within the several states. The actual exceptions are special and limited, and prove the rule. They are, 1. A reference to the civil conditions obtaining within the states to furnish an artificial enumeration of persons as the basis of federal representation and direct taxation distributively between the states. 2. A reference to the political rights of suffrage within the states, as, respectively,

supplying the basis of the federal suffrage therein. 3. A provision securing to the citizens of every state within every other the privileges and immunities (whatever they may be) accorded in each to its own citizens. 4. A provision preventing the laws or regulations of any state governing the civil condition of persons within it, from operating upon the condition of persons "held to service or labor in one state, under the laws thereof, escaping into another." (*Const. U. S. art.* 1, § 2, *subd.* 1 *and* 3; *art.* 4, § 2, *subd.* 1 *and* 3. *Laws of slave states, and of free states, on slavery. Ex parte Simmons*, 4 *W. C. C. R.* 396. *Jones* v. *Van Zandt*, 2 *McLean*, 597. *Groves* v. *Slaughter*, 15 *Peters*, 506, 508, 510. *Prigg* v. *Penn*, 16 *id.* 611, 612, 622, 623, 625. *Strader* v. *Graham*, 10 *How.* 82, 93. *New York* v. *Miln*, 11 *Peters*, 136. *Dred Scott* v. *Sandford*, 19 *How.* 452, *per Ch. J.; Nelson J.*, 459, 461; *Campbell, J.*, 508, 9, 516, 17.) None of these provisions, in terms or by any intendment, support the right of the slave owner in his own state or in any other state, except the last. This, by its terms, is limited to its special case, and necessarily excludes federal intervention in every other. (3.) The common law of this state permits the existence of slavery in no case within its limits. (*Const. art.* 1, § 17. *Somersett's case*, 20 *How. St. Trials*, 79. *Knight* v. *Wedderburn*, *id.* § 2. *Forbes* v. *Cochrane*, 2 *B. & C.* 448. *Shanley* v. *Harvey*, 2 *Eden*, 126. *The Slave Grace*, 2 *Hagg. Adm.* 118, 104. *Story's Confl. Laws*, § 96. *Co. Litt.* 124 *b.* (4.) The statute law of this state effects an *universal* proscription and prohibition of the condition of slavery within the limits of the state. (1 *R. S.* 656, § 1; 659, § 16. 2 *id.* 664, § 28. *Dred Scott* v. *Sandford*, 19 *How.* 591–595. *Laws of* 1857, *p.* 797.)

III. It remains only to be considered whether, under the principles of the *law of nations*, as governing the intercourse of friendly states, and as adopted and incorporated into the administration of our municipal law, *comity* requires the recognition and support of the relation of slave owner and slave between strangers passing through our territory, notwithstand-

ing the absolute policy and comprehensive legislation which prohibit that relation and render the civil condition of slavery *impossible* in our own society. The *comity*, it is to be observed, under inquiry, is (1) of the *state* and not of the *court*, which latter has no authority to exercise comity in behalf of the state, but only a judicial power of determining whether the main policy and actual legislation of the state exhibit the comity inquired of; and (2) whether the comity extends to yielding the affirmative aid of the state to maintain the mastery of the slave owner and the subjection of the slave. (*Stor. Confl. Laws*, § 38. *Bank of Augusta* v. *Earle*, 13 *Pet.* 589. *Dred Scott* v. *Sandford*, 19 *How.* 591.) (1.) The principles, policy, sentiments, public reason and conscience, and authoritative will of the state sovereignty, as such, have been expressed in the most authentic form, and with the most distinct meaning, that slavery, whencesoever it comes, and by whatsover casual access, or for whatsoever transient stay, *shall not be tolerated upon our soil.* That the particular case of *slavery during transit* has not escaped the intent or effect of the legislation on the subject, appears in the express permission once accorded to it, and the subsequent abrogation of such permission. (1 *R. S. part* 1, *ch.* 20, *tit.* 7, §§ 6, 7. *Repealing act*, *Laws of* 1841, *ch.* 247.) Upon such a declaration of the principles and sentiments of the state, through its legislature, there is no opportunity or scope for judicial doubt or determination. (*Story's Confl. Laws*, §§ 36, 37, 23, 24. *Vattel*, *p.* 1, §§ 1, 2.) (2.) But, were such manifest enactment of the sovereign will in the premises wanting, as matter of general reason and universal authority, the *status* of slavery is never upheld in the case of strangers, resident or in transit, when the domestic laws reject and suppress such *status* as a civil condition or social relation. The same reasons of justice and policy which forbid the sanction of law and the aid of public force to the proscribed *status* among our own population, forbid them in the case of strangers within our territory. 2. The *status* of slavey is not a natural relation, but is contrary to nature, and

at every moment it subsists, it is an ever new and active violation of the law of nature. (*Const. Virginia, Bill of Rights*, §§ 1, 14, 15.) It originates in mere predominance of physical force, and is continued by mere predominance of social force or municipal law. Whenever and wherever the physical force in the one stage, or the social force or municipal law in the other stage, fails, the *status* falls, for it has nothing to rest upon. To continue and defend the *status*, then, within our territory, the stranger must appeal to *some* municipal law. He has brought with him no system of municipal law to be a weapon and a shield to this *status;* he finds no such system here. His appeal to force against nature, to law against justice, is vain, and his captive is free. 3. The law of nations, built upon the law of nature, has adopted this same view of the *status* of slavery, as resting on force against right, and finding no support outside of the jurisdiction of the municipal law which establishes it. 4. A state proscribing the *status* of slavery in its domestic system, has no apparatus, either of law or of force, to maintain the relation between strangers. It has no code of the slave owner's rights or of the slave's submission, no processes for the enforcement of either, no rules of evidence or adjudication in the premises, no guard houses, prisons or whipping posts to uphold the slave owner's power and crush the slave's resistance. But a comity which should recognize a *status* that can subsist only by force, and yet refuse the force to sustain it, is illusory. If we recognize the fragment of slavery imported by the stranger, we must adopt the fabric of which it is a fragment and from which it derives its vitality. If the slave be eloigned by fraud or force, the owner must have replevin for him, or trover for his value. If a creditor obtain a foreign attachment against the slave owner, the sheriff must seize and sell the slave. If the owner die, the surrogate must administer the slave as assets. If the slave give birth to offspring, we have a native born slave. If the owner, enforcing obedience to his caprices, maim or slay his slave, we must admit the *status* as a plea in bar to the public justice.

If the slave be tried for crime, upon his owner's complaint, the testimony of his fellow slaves must be excluded. If the slave be imprisoned or executed for crime, the value taken by the state must be made good to the owner, as for "private property taken for public use." Every thing or nothing, is the demand from our *comity;* every thing or nothing, must be our answer. 5. The rule of the law of nations which permits the transit of strangers and their property through a friendly state, does not require our laws to uphold the relation of slave owner and slave between strangers. By the law of nations, men are not the subject of property. By the law of nations, the municipal law, which makes men the subject of property, is limited with the power to enforce itself, that is, by its territorial jurisdiction. By the law of nations, then, the strangers stand upon our soil in their natural relations as men, their artificial relation being absolutely terminated. (*The Antelope*, 10 *Wheat.* 120, 121, *and cases ut supra.*) 6. The principle of the law of nations which attributes to the law of the domicil the power to fix the civil *status* of persons, does not require our laws to uphold, *within our own territory*, the relation of slave owner and slave, between strangers. The principle only requires us (1) to recognize the consequences in reference to subjects within our own jurisdiction, (so far as may be done without prejudice to domestic interests,) of the *status* existing abroad; and (2) where the *status* itself is brought within our limits and is here permissible as a domestic *status*, to recognize the foreign law as an authentic origin and support of the actual *status*. It is thus that *marriage* contracted in a foreign domicil, according to the municipal law there, will be maintained as a continuing marriage here, with such traits as belong to that relation here; yet, incestuous marriage or polygamy, lawful in the foreign domicil, cannot be held as a lawful continuing relation here. (*Story's Confl. Laws*, §§ 51, 51 *a*, 89, 113, 114, 96, 104, 620, 624.) (7.) This free and sovereign state, in determining to which of two external laws it will by *comity* add the vigor of its adoption and adminis-

tration within its territory, viz. a foreign municipal law of force against right, or the law of nations conformed to its own domestic policy under the same impulse which has purged its own system of the odious and violent injustice of slavery, will prefer the law of nations to the law of Virginia, and set the slave free.

Impius et crudelis judicandus est, qui libertati non favet. Nostra jura in omni casu *libertati dant favorem.* (*Co. Litt. ut supra.*)

J. Blunt, for the people. I. The state of slavery is contrary to natural right, and is not regarded with favor in any system of jurisprudence. All legal intendment is against it, and in favor of freedom.

II. The law of slavery is local, and does not operate beyond the territory of the state where it is established. When the slave is carried, or escapes beyond its jurisdiction, he becomes free, and the state to which he resorts is under no obligation to restore him, except by virtue of express stipulation. (*Grotius, lib.* 2, *ch.* 15, 5, 1; *Id. ch.* 10, 2, 1. *Wiquefort's Ambassador, lib.* 1, *p.* 418. *Bodin de Rep. lib.* 1, *cap.* 5. 4 *Martin*, 385. *Case of the Creole, and opinion in the House of Lords*, 1842, 1 *Phill. on International Law*, 316, 335.)

III. The provision in the federal constitution relating to fugitive slaves, recognizes this principle of universal jurisprudence, and imposes on the free states an obligation which is limited to fugitive slaves. If slaves were recognized as property under the constitution, this provision would be unnecessary. When this provision was under discussion, it was amended by striking out the word "legally" before "held to service;" because some thought slavery could not be legal in a moral point of view, and substituting "under the laws thereof." (*Jour. of Fed. Const.* 1787, *pp.* 306, 365, 384.) It was then deemed improper to admit in the constitution the idea that there could be property in men. (*Madison's Works*, 1429.) C. C. Pinckney, in speaking of this provision, says, "We have obtained a

right to recover our slaves, in whatever part of America they may take refuge—which is a right we had not before." (16 *Peters*, 648.)

IV. The persons here claimed as slaves, are free by the express enactment of the legislature of this state. (1 *R. S. part* 1, *tit.* 656, 7, § 1.) "No person held as a slave shall be imported, introduced, or brought into this state, on any pretense whatever. Every such person shall be free." "Every person brought into this state as a slave shall be free." The exception originally made in favor of persons in transitu with their slaves, was repealed in 1841. (*Ch.* 247.) The right to declare and control the condition of its citizens is a right belonging to the states, and has not been conferred on the federal government. Otherwise, the whole power over slavery must be deemed within the control of congress.

V. They cannot be held by virtue of any provision of the constitution of the United States. The provisions cited on the argument, before Mr. Justice Paine, are: That relating to fugitives from justice. (*Art.* 4, § 2.) That full faith and credit shall be given in each state to the public acts of every other state. (*Art.* 4, § 1.) That the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. (*Art.* 4, § 2.) That no citizen shall be deprived of life, liberty, or property, without due process of law. (*Art.* 5 *of Amendments.*) None of these provisions have any reference to this case. They are not fugitives escaping into this state from another state. We give full faith and credit to the act of Virginia, that made these persons slaves there. We allow the appellant all the privileges and immunities of a citizen of this state. He has not been deprived of property by these proceedings. The appellant had no property in these persons. It ceased to be property when he brought them into the state of New York. The constitution of the United States is a grant of powers to the general government. It follows, by necessary consequence, that what is not granted is reserved.

If there is no grant of power to enforce upon New York the obligation to allow a citizen of a slave state to bring his slaves here and retain them here as slaves, while sojourning or passing through this state, the general government has not the power; and the right to do so does not exist. New York having prohibited the act, no jurisdiction can declare her law unconstitutional. She has the right to reiterate the law of nature—to purge her soil of an evil that exists only in violation of natural right—to maintain, in practice as well as theory, the sacred rights of persons and personal liberty. Even in consenting to the reclamation of fugitives from service, she does not acknowledge the law of slavery. She agrees to ignore that question; and not to inquire into the nature of the duty of service, on the part of the fugitive, whether a slave or an apprentice; but to remit him to the courts of the state from which he fled. But this is the extent of her duty. Her bond extends no further than to the fugitive. As to all other persons, her laws protect their personal liberty against all claimants. It was not contemplated, at the formation of the constitution, that slavery was to be a permanent institution of the United States. It is inconsistent with the principle that lies at the foundation of our government. It is in contradiction to the declaration of independence, and to the preamble to the constitution. All the provisions of that instrument and contemporaneous history look to its ultimate extinction by the legislation and action of the state governments. (*See Emancipation acts of Vermont in* 1777; *New Hampshire*, 1783; *Rhode Island*, 1784; *Connecticut*, 1784; *New York*, 1799; *New Jersey*, 1804; *and Pennsylvania*, 1780; *Bill of rights of Massachusetts, and decision in James* v. *Lechmere, in* 1770, that slavery was illegal in that state; 2*d vol. Franklin's Works*, 517; *Madison's Works*, 1429; *Jefferson's Notes*, 152; *Washington's Will*, 1*st vol.* 569; *Helper's Crisis, pp.* 193, 224.) In incorporating the fugitive slave provision into the constitution, the convention was careful not to do any thing which should imply their sanction of slavery

as legal. The provision reported by the committee, September 12, 1787, read "legally held to service;" and it was amended September 15, by striking out "legally," so as to read "held to service under the laws thereof." (*See Journal*, 384, *and Madison*, *pp.* 1558, 1589.) The word "service" was substituted for "servitude," on motion of Edmund Randolph: the latter being descriptive of slaves, and the former of free persons. (3 *Mad.* 1569.)

VI. These persons are not to be held as slaves under any implied covenants between the states of the union, nor by any rule of comity. (1.) There is no implied obligation on the part of New York to allow a slave within her borders, in any form, or under any circumstances. The provision relating to the surrender of fugitives from service, is the only possible case where such an obligation can arise. And by incorporating this provision in the constitution, every other case is excluded: *Expressio unius, exclusio alterius.* If the general right existed, and it was admitted that a slave of a slave state might still be held if escaping into or taken into a free state *in transitu*, the constitutional provision as to fugitives would be superfluous. (2.) No comity of states requires us to admit slavery into our state in any form. In extending comity towards the laws of other states, it is the state and not the court that establishes the rule. (*Chief Justice Taney in Augusta* v. *Earle*, 13 *Peters*, 589. *Grotius*, *lib.* 2, *ch.* 22, § 16.) There can be no such comity here, because the state has made an express statute declaring these persons to be free. Comity is not an obligation to be enforced by a superior, but a courtesy allowed by the party assuming the duty. In deciding whether comity requires any act, we look to our own laws and adjudication for authority. And it can never be exercised in violation of our laws. (*Story's Confl. of Laws*, §§ 23, 24, 36, 37. *Willard* v. *The People*, 4 *Scam.* 461. *Commonwealth* v. *Ayres*, 18 *Pick.* 221. 3 *Am. Jurist*, 404.) No comity requires us to allow an act here, by citizens of another state, that if done by our own citizens would be a felony. The

comity of nations is based upon principles that destroy all right to hold these persons as slaves. The laws of moral right—the recognition of personal liberty by the law of nations forbid it.

VII. These persons cannot be restrained of their liberty, whatever may have been their state in Virginia. If restrained of liberty here, it must be either under and by virtue of our laws, or under the laws of Virginia. The allegation of the suit is, that they were held and confined in a certain house in this city against their will. The answer is, they are slaves. Our laws prohibit any such holding. They furnish no remedy if the person claimed refuse to be detained. The question here is, can they be detained? Certainly not by our laws; and our courts can only administer our own laws. The laws of Virginia are not in force here. If the slave resists, how can he be compelled to subjection? If the master has not the power to enforce obedience, he cannot invoke the aid of law, for no law exists for such a case. It follows, that our laws, in this respect, if they remain neutral, leave the parties to their natural rights. This being so, the slave is free. Our authorities can only execute the laws of this state, and not those of another state.

VIII. They are free by the common law. (*Co. Litt.* 124 *b.* *Somersett's case*, 20 *Howell's State Trials*, 79. *Knight* v. *Wedderburn*, *id.* 2. *Forbes* v. *Cochrane*, 2 *Barn. & Cress.* 449. *Greenwood* v. *Curtis*, 6 *Mass. Rep.* 366. *Case of the Antelope*, 10 *Wheaton*, 420. *Jones* v. *Whealon*, 2 *McLean*, 596.) The English common law, as adjudicated before and since our revolution, adjudges them to be free. By the principles of the law of nations, as expounded by the philosophers and jurists of various countries, and recognized by all christendom, they are free. The constitution of the United States does not, by any express terms, deliver them to slavery. No implication can be drawn from any provision of that instrument, to remand them to slavery. The laws of this state declare them free. In behalf of their freedom, we urge the

common jurisprudence of all nations; the principles of our own common law; the doctrines of the founders of our government; the legislation of our state; the public opinion of the world; and we deny, on the part of the people of the state of New York, that these persons, claimed as slaves, can be deemed such in our courts of justice.

By the Court, MITCHELL, P. J. The act of the legislature of this state, passed in 1817, and re-enacted in parts in 1830, (1 *R. S.* 656,) declaring that "no person held as a slave shall be imported, introduced, or brought into this state on any pretense whatever, except in the cases thereinafter specified," and that "every such person shall be free," applies to this case. The slaves in this case were brought from Virginia into this state, and remained here some short time: and although they were only brought here with a view to carry them from this state to Texas, they were (after the exceptions in that act were repealed by a subsequent act) within the prohibitions of that act; and are free if those acts be constitutional. The addition made to the act, in the revised statutes of 1830, seems to have been intended to place this beyond doubt, (*see* § 16, *p.* 559;) it is, "Every person born within this state, whether white or colored, is FREE: every person who shall hereafter be born within this state, shall be FREE: and every person *brought* into this state as a slave, except as authorized by this title, shall be FREE." One of the exceptions mentioned in that title allowed a person, not an inhabitant of this state, traveling to, or from, or passing through, this state, to bring his slave here and to take him away again; provided, that if the slave continued here more than nine months, he should be free. Those exceptions are repealed by the act of 1841.

Comity does not require any state to extend any greater privileges to the citizens of another state than it grants to its own. As this state does not allow its own citizens to bring a slave here even, *in transitu*, and to hold him as a slave for

any portion of time, it cannot be expected to allow the citizens of another state to do so.

Subdivision 1 of section 2 of article 4 of the constitution of the United States makes this measure of comity a right, but with the limitation above stated: it gives to the citizens of a sister state only the same privileges and immunities, in our state, which our laws give to our own citizens. It declares, that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Subdivision 3 of that section is confined to the case of a person held to service or labor *escaping* from one state into another. It does not extend to the case of a person voluntarily brought by his master into another state for any period of time: it cannot by any rule of construction be extended to such a case. It is, "no person held to service or labor in one state, under the laws thereof, *escaping* into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor," &c.

The clause of the constitution giving to congress power "to regulate commerce with foreign nations and among the several states, and with the indian tribes," confers no power on congress to declare the *status* which any person shall sustain, while in any state of the union. This power belonged originally to each state, by virtue of it sovereign and independent character, and has never been surrendered. It has not been conferred on congress, or forbidden to the states, (unless in some provisions in favor of personal rights,) and is therefore retained by each state, and may be exercised as well in relation to persons *in transitu*, as in relation to those remaining in the state.

The power to regulate commerce may be exercised over persons as passengers, only while on the ocean and until they come under state jurisdiction. It ceases when the voyage ends, and then the state laws control.

This power to regulate commerce, it has been expressly declared by the supreme court of the United States, did not

prevent the state of Mississippi from prohibiting the importation of slaves into that state for the purposes of sale. The same court has held that goods when imported can (notwithstanding any state law) be *sold* by the importer in the original packages. It follows that the power to regulate commerce, confers on the United States some check on the state legislation as to goods or merchandise, after it is brought into the state, but none as to persons, after they arrive within such state.

If this could be regarded, in the case of the slave-holding states, as a police regulation, it may also be so regarded as to the free states. They consider (as the legislation of this state for many years has shown) that the holding of slaves in this state, for any purpose, is as injurious to our condition and to the public peace, as it is opposed to the sentiment of the people of this state.

The judgment or order below should be affirmed, with costs.

ROOSEVELT, J., dissented.

[NEW YORK GENERAL TERM, December 30, 1857. *Mitchell, Roosevelt, Davies, Clerke* and *Peabody*, Justices.]

AIKIN *vs.* THE ALBANY, VERMONT AND CANADA RAIL ROAD COMPANY and others.

26 289
30 299
31 647
50b 303
69a 269

The true principle, deducible from all the cases, is that words in a deed, which are not in form either a covenant or a condition, will be construed as either the one or the other, where, without such construction, the party has no remedy; while the leaning of the law against forfeitures always inclines the courts to call them a covenant, rather than a condition, where the remedy can be legally attained by such construction.

A. and wife conveyed by deed, executed by the grantors only, to the Albany Northern Rail Road Company a right of way through A.'s farm, for the rail road of the grantees, said farm lying on both sides of the strip granted. The deed contained this clause: "the said Albany Northern Rail Road Company *is to construct and maintain* two good farm crossings over said rail road," and a passage under the same, &c. The grantees accepted the deed, had it recorded, and entered into possession of the strip of land, con-

structed their rail road thereon, mortgaged their rail road, franchise, &c. and became bankrupt; and on a foreclosure of the mortgage the road, franchise, &c. were sold, and purchased by B., with notice of A.'s claim under the deed. B. sold his rights, &c. to the defendants, who entered into possession of the land granted, and were using the same for the purposes of the rail road. Neither the crossings over, nor the passage under, the rail road, were ever constructed, and by an embankment A. was cut off from all access to a portion of his farm. *Held* that the words "is to construct" imported an *obligation to construct;* and that by accepting the deed, and taking the rights under it, the grantees ratified the obligation, and in law agreed to fulfill it; the act of acceptance being as full a ratification of the agreement, and consent to its tenor, as any signing and sealing by them would have been.

Held also that these words were to be construed as a *condition*, which would bind the land, in the hands of the defendants; and that one remedy of the grantor for a breach, if he chose to pursue it, was by re-entry; but that this was not his only remedy. That as the defendants had seen fit to enter, and agree to have the land by force of the deed, they were bound to *perform the conditions* in the deed; and that a suit in equity to compel such performance would lie.

THIS action was tried at the circuit in Rensselaer county, in June, 1857. The facts are sufficiently set forth in the following opinion of the judge before whom the cause was tried.

Seymour & Van Santvoord, for the plaintiff.

John H. Reynolds, for the defendants.

GOULD, J. Not having before me the deed of the plaintiff to the Albany Northern Rail Road Company, I take the statement of it, given in the pleadings, to be accurate; and from it and the evidence the facts of the case are as follows: Aikin and wife conveyed, by deed executed by the grantors only, to the Albany Northern Rail Road Company, a right of way through Aikin's farm, for the said rail road company; which company was a corporation organized under the provisions of the act of the legislature, known as the general rail road act. And the description, in the deed, of the land conveyed, shows that Aikin's farm lies on both sides of the strip granted by

the deed. In this deed occurs this clause: "The said Albany Northern Rail Road Company *is to construct and maintain* two good farm crossings over said rail road;" and a *passage under* said rail road, large enough for the passing of teams with loads of hay and grain. That company received this deed, and had it recorded; entered into possession of said strip of land; constructed their rail road thereon, with an embankment over twenty feet high at the part where the passage under the road was to be made; mortgaged their rail road, franchise, &c., and became bankrupt; and on said mortgage their road, franchise, &c. were sold away from them to one Bender; on which sale, notice of the plaintiff's claim under said deed, and in and by this suit, was publicly read. Bender subsequently sold his rights, &c. to the Albany, Vermont and Canada Rail Road Company; and this company was, on motion, made a party defendant to this suit, and is now the only real defendant in the case; and is in possession of the premises granted by said deed, (using the same for the operating of its rail road,) as the grantee had been, before said mortgage sale. But neither of said companies has constructed either the crossings over, or the passage under, said rail road, named in the deed; and the plaintiff is cut off from the access to a part (60 acres) of his farm, to secure which access the specified clause was inserted in the deed. It is proved that prior to this deed the plaintiff had always been in the habit of passing with teams, in the course of his farming, to and from the lands westerly of the present rail road, nearly at the place where the passage under the rail road was to be. This suit is brought to compel the Albany, Vermont and Canada Rail Road Company *to construct* these crossings over, and this passage under, said rail road; and pay damages for not sooner constructing them, as well as the expense to which the plaintiff has been put in making the two crossings which the company failed to make, and which he was under the necessity of having.

The greater part of the argument, on both sides, has been

on the averment, by the plaintiff, that the Albany Northern Rail Road Company, in and by the said deed, *covenanted* to construct, &c.; which covenant, the plaintiff claims, runs with the land, while this defendant claims that there is no such covenant; or if there be, that it does not run with the land, but is a *collateral* covenant, binding only the covenantor. Perhaps the decision of this point may not be found absolutely essential to the determination of the suit; but it is sufficiently involved in the case to merit consideration; and the argument of it, on both sides, has been so close and elaborate as to require careful comment. And it may well be, that its examination will evolve principles decisive of the whole litigation. Now, the word "covenant" has a *technical* meaning, (it is a written agreement, signed and sealed by the covenantor,) within which it may be that, as the defendant claims, a "covenant" *cannot* be created by a *deed-poll*, as against the *grantee* therein: for, however strong his acts—of accepting the deed and taking the estate under it—may be in affirmance of his actual agreement to terms imposed on him by the deed and written in the deed, those acts do not write his name or affix his seal; and the deed, being not signed or sealed by him, is not his deed; and a covenant in it is not technically his covenant. But it does not therefore follow, that he cannot be bound to perform the terms imposed on him by the tenor of the deed.

But, for the present, granting it be a covenant—(and this reasoning I would apply as well to what I have called "terms imposed")—granting it be a *covenant*, does it run with the land? In this particular case this question is inseparably connected with the point raised by the defendant, that if a covenant, and one running with the land, it runs with the land of the *grantee*, and for *his benefit* alone; as the plaintiff, having granted the *fee*, retains no interest in the premises to which the covenant is attached, and is to them a stranger, and can have no right to enforce the covenant. Without here stating the defendant to be, as I think he will be found to be,

wrong as to the facts, I will consider the two positions together. A covenant which is beneficial to, or binding on, the owner, *as owner*, and on or to no other person, runs with the land. While, of covenants to *do acts* on the premises, collateral covenants are such as are beneficial to the lessor, (grantor,) without regard to his continuing the owner of the estate in the premises. (5 *Barn. & Adol.* 11. 2 *Kern.* 302.) And what does this covenant provide for? For the means of passage over—for an easement to be enjoyed upon and over—the very land granted, by the owner, as owner, not merely of the adjoining lands, but of the easement, and by no other person. And as it is to be *maintained* in repair, unquestionably binding on the owner, *as the owner* of the rail road. It is *not* a *collateral* covenant, beneficial to the grantor of the principal estate who reserves the easement by the covenant, *without regard to his continuing the owner of the estate*—the estate in the easement; which estate belongs to, and is parcel of, the estate in the farm adjoining. It cannot be questioned that *if* a covenant, it is one that runs with both the farm and the rail road land conjointly. It is an *appurtenance* to the farm, and a right in and upon the rail road land, in whosever hands they may be, and however the titles thereto may be derived. There is a *privity of estate* between the owners of the respective premises, as "the thing to be done concerns the land or estate" of both in connection, and "*that* is the medium which creates the privity between them." (3 *Denio*, 297.)

But it is said by the defendant, that *if* a covenant, it is a covenant relating to a thing not *in esse* at the making of the deed, but to be thereafter done by the grantee; and so cannot bind the *assignee* of the grantee, (the present principal defendant,) as on its face it names no assigns, and purports to be the covenant of but the Albany Northern Rail Road Company; and such a covenant does not run with the land. The cases cited by the defense state this position, in general terms. But their true purport and application here, are to be sought for in the examples and application in those cases. Thus,

while a covenant to *repair* a building, on demised premises, does run with the land, a covenant to *build* a new house, on the same premises, has been held not to do so. Here it as plain that though such new building might make the premises more valuable to the grantor, *if* he became entitled to re-enter, yet he never had any such house, nor is his estate or right in the rent in any way touched or affected, by the building or not building. Yet it is also held that where the thing covenanted for, though not *in esse*, touches or concerns the thing demised, the covenant does run with the land. (3 *Denio*, 285.) In the case on trial, is there any question that the thing covenanted for touches and concerns the very thing (*in esse*) demised—the land, including the grantor's existing way over it; that it is an incumbrance or charge upon the land, for the immediate benefit of the grantor, in the continued enjoyment of the right of way which, at the time of the grant, he had over his own land; and which, by the tenor of this covenant, he meant should remain unobstructed? His right of way was *in esse*, and it was to be improved or repaired by the grantee, (by raising the road-bed, as specified in the deed;) and the grantee was not to make a hole in an embankment not *in esse*, but to leave a road not covered by the embankment in one place, while in two others the company was so to build the embankment that it should not obstruct the way. And, in regard to the latter two, this manner of building would necessarily make them slope the sides of the embankment, and continue (either by embankment or cutting) their work on to the plaintiff's adjoining land, as a part of the "manner and form" in which they were to be at liberty to occupy and enjoy the premises granted.

But (as before intimated) the defendant's *facts* are by no means as strong as his statement. In the first place, the deed is, on its face, of a right of way, for the purposes of a rail road; and such a grant, like one for a highway, or a turnpike, is but of an *easement*, and never of the *fee* in the land; which fee is always in the grantor, subject to the easement; and

reverts, discharged of the easement, upon or by the discontinuance (by non-user or otherwise) of the way for rail road purposes. In the second place, were the deed, on its face, silent as to rail road purposes, and of an absolute fee, it could not, in law, operate as such; for the grantee is a corporation, organized for a specified particular purpose: and 1st, it is, by the very act under which it exists, authorized to take and hold lands *for rail road purposes only;* and 2dly, were the act silent on this point, the nature of its existence would, *per se*, limit its right to hold lands to the purposes of that existence: so that *it* can hold no fee simple absolute. Besides, the law requires every such corporation to *fix a period to its duration;* the charter *must expire* at a prescribed time. There is a further illustration, or rather proof, of this position, in another provision of the rail road act, by which such corporations are authorized to *alter their route*, or make a *new location*, in certain cases; and that when, by such change, the company leaves lands that have been given "to the company," "compensation shall be made to all persons for any *injury* done" (by making the abandoned track) to lands so given: proving that these lands *revert to such persons.* Would it be pretended that, were this defendant so to change the location of this rail road as entirely to leave the plaintiff's farm, or even its present position, it could grant the *fee* of this strip of land to a *stranger?* The fee must, from the very nature of the tenure, in such an event revert to the grantor. To hold the contrary—to concede the right to hold, or purchase, for any other than rail road purposes—would allow any rail road corporation to speculate in lands, without limitation as to quantity, or location. The merely exceptional power, to purchase an absolute fee in lots, additional to the roadway, for buildings, depots, &c., with the right, in case of a necessary change of depot grounds, &c. to sell a *fee* in such grounds and buildings, is but an exception, *ex necessitate rei;* incurring no practical difficulty in its application, and furnishing no rea-

son for changing the general rule; especially as they are not taken for the *easement.*

Again, if it be a covenant, there can be no question that it is founded on ample *consideration:* the conveyance of the premises is abundant for that purpose; even were it possible for any one to doubt that so prominent and valuable a provision was a main point, on both sides, in the negotiation and purchase. It is by no means necessary that a covenant should contain a precise form of stating, technically, its consideration. The whole instrument—the whole transaction—is to be taken together; its parts are not to be considered independently; especially not for the purpose of making a part fail of effect. The rule is, that no contract is to be made void by construction; or to be adjudged void, unless palpably so. You must so construe, *ut res magis valeat, quam pereat.*

As to the preceding points, except the one as to consideration, and as to *what words* may be construed to make a covenant, or a condition, I am aware that, in *Tallman* v. *Coffin,* (4 *Comst.* 138, 139,) cited by defendants, it is said that the phrase "upon paying" is *not* a condition precedent to a surrender at a specified time; where such surrender at such time is absolutely covenanted for; and that time was after the term ended, so that by law the party was bound unconditionally to surrender. It is not necessary for me to infringe on that decision, though I should hardly try to *extend* it beyond its exact point, as it seems to me very technical; and it plainly operated a serious hardship, very far from the "meaning and intention" of the lessee; and if it were the meaning and intention of the lessor, I am unable to avoid thinking that he took the dishonorable, not to say dishonest, course of attaining his end by appearing to say something very different from his meaning and intention. But, however this may be, the remark of counsel, (cited in *Tallman* v. *Coffin,* from 2 *Mod.* 35,) that "paying and yielding" were never considered a condition, is in reason not supported by the *decision* of the case in *Modern Reports;* and in principle is against that decision and a variety of other au-

thorities, which expressly hold that "yielding and paying" in an indenture executed by the lessee, constitute a covenant to pay; (*Pow. Cont.* 242; 1 *Ventris*, 10; *Carthew*, 135, 232; 1 *Bac. Abr.* 530, *Covenant B;* 2 *Mod.* 92; *Cro. Jac.* 522, 240; *Co. Litt.* § 217, *note; Doug.* 735–7;) and *Cro. Jac.* 399, holds them a *covenant to pay* where lessee did *not* execute the lease. And that I am correct in this position, can I think be seen, by noting that the case cited in *Tallman* v. *Coffin*, from 8 *Cowen*, 296, (*Jackson* v. *McClallen*,) does not go the length for which it is so cited; since in the case last named there was an *express covenant*, covering the same subject, and to the same tenor, as the clause ("building and keeping in repair") which the plaintiff was seeking to enforce as a *condition*; and though that *decision* was, that the plaintiff's remedy must be on the *express covenant*, to prevent a forfeiture, the law always striving to avoid forfeitures; yet, while giving that decision, and while saying that "paying rent" is no *condition*, and "making up the hedge again" is not a condition, *Ch. J. Savage* says of the latter words, "*covenant* lies for not repairing the hedge;" and he adds, generally, "so similar words may amount to a condition, when without such construction the party could have no remedy; but not where there are express covenants to which recourse may be had." Which precise principle he takes directly from the case in 2 *Mod.* 35, where the question arose on an attempt by a lessor defendant, to avoid the force of his own covenant for quiet enjoyment; "that the lessee paying, &c. and performing his covenants, &c. should quietly enjoy," &c. The lessee had cut wood on the demised premises, thus committing a positive breach of his covenant not to do so; and the lessor had, therefore, disturbed the lessee's quiet enjoyment by an actual entry. The lessor, being sued on his covenant for quiet enjoyment, defended his entry on the ground that "paying, &c. and performing his covenants," &c. were a condition (precedent to, or of,) the lessee's right to enjoy; not, however, making any pretense that the rent was not paid; (so "paying," &c. are not in the case decided.) Deciding

those words to be a condition, in that case, would have enforced an actual forfeiture, consummated by re-entry; and that, too, where there was an *express covenant* affording him a full remedy. Yet, even in that case, the court said, "where without such construction the party could have no remedy, such words would amount to a *condition*," with all its consequences of *forfeiture*. The case in 8 *Cowen*, 296, plainly takes this precise ground; and in the head note, the reporter after saying, "paying, &c. do not *per se* create a condition, where there is an *express covenant* to pay," goes on, "*otherwise, it seems, where there is no remedy by covenant.*"

I deem the true principle, deducible from all the cases, to be, that words not in form either a covenant or a condition, will be construed as either the one or the other where without such construction the party has no remedy. While the leaning of the law against forfeitures, always inclines the courts to call them a covenant rather than a condition, where the remedy can be legally attained by such construction.

In applying this principle, it is necessary to consider the wording of the clause, in the deed in question, on which this action is founded, "the said Albany Northern Rail Road Company *is to construct*," &c., in connection with the *acts* of accepting such deed, and going into possession and constructing a rail road on the premises, under it. Had the words been "it is *agreed* that the said rail road company shall construct," could there be a doubt of their meaning? "Agreed," *ex vi termini*, means that it is the agreement of *both parties*, (whether both sign it or not,) each and both consenting to it. And the *act of acceptance* is as full a ratification of the agreement, and consent to its tenor, as any signing and sealing. To hold otherwise were to allow a grantee to perpetrate a *fraud*, to attain his own benefit, and yet "deprive the grantor of an important equivalent, which was taken into the account, in settling the terms" of the sale. (5 *Hill*, 258, 259. 3 *John. Cas.* 65. 1 *Seld.* 229.) And is there any more doubt about the words "is to construct?" They import

an *obligation to construct;* and by accepting the deed and taking the rights under it, the grantee ratified the obligation—in law agreed to fulfill the obligation. (*Cro. Jac.* 399.)

But, were it possible to say that these acts make no *affirmative contract,* there can be no possibility of saying that the land was not granted *subject to the duty* of such construction; that such duty did not enter into the *very essence of the tenure.* And, upon the hypothesis that the words cannot (in law) be a covenant, because the grantee did not execute the deed, "the party will be without remedy," unless they be construed a *condition.* As a condition, then, what is their effect? The defendant concedes such condition would *bind the land;* but says the remedy (if there be any) is to enter for condition broken. That such a remedy may be had at common law, and is appropriate, there can be no question. But is it the *only* remedy? *Littleton* (§ 374) says, of conditions binding the land, though a party "*never sealed* any part of the indenture, inasmuch as he entered and agreed to have the lands by force of the indenture, *he is bound to perform the conditions* within the same indenture, if he will have the land." And Coke's illustrations of this section show (covenants, construed by reason of a failure of one party to seal the indenture as binding on such party, entering and holding under the indenture, as covenants as well as) conditions, to *do positive acts.* Thus, A. executed an indenture of lease to D. and R., in which were a covenant to pay rent, and a covenant to pay a sum in gross; and the indenture being executed by D. but not by R., it was held not merely that *R.* was bound by the covenant to pay rent, but a suit against D. only, for the sum in gross, was (on plea in abatement) adjudged bad for not joining R. as a defendant, because he was bound by that covenant also, he having entered, &c. on the land. "He is bound to perform the condition" attached to the tenure. And it may be worth noting, that this decision really covers the ground that there may be an actual covenant, where the deed is not

executed by the covenantor—a deed which, so far as *he* is concerned, is a *deed-poll.*

In the case before me, a forfeiture of the estate, though fatal to the defendant, would be utterly inadequate to the plaintiff's protection, and could hardly be called an equitable relief. Re-entering on an embankment twenty feet high, running across the middle of his farm, where its existence is an obstruction to the very right he intended to preserve, and its removal a labor he ought not to be compelled to undertake, is hardly a remedy. And, in equity, he is entitled to what it was agreed he should have. To say that a specific performance would be inequitable, hardly lies in the mouth of this defendant, when this company had not merely the legal notice of the recorded deed, but actual notice, before the purchase of this claim, and not only of that, but that this suit was pending to enforce that claim. That it was originally "a hard bargain," which equity ought not to enforce, cannot very properly be said on behalf of a party that (having the legal power to get the land, at the appraisal of commissioners, without any such condition,) saw fit voluntarily to make this precise contract. It was made with open eyes; and now claiming it to be burdensome, when its purport was, or *ought* to have been, perfectly apparent to the grantee and its scientific engineers, at the time of its being made, merely shows that such party is not entitled to be sheltered by the court from the consequences of acts done either with a reckless disregard of consequences, or with the intention to injure the grantor by not performing a part of the contract so essential to him. The plaintiff is, in common sense, in law and in equity, entitled to the thing for which he bargained. True, were the suit *at law*, the only remedy would be by entry for condition broken. But the plaintiff has not followed the discountenanced remedy of a forfeiture. He has not sought to enforce the penalty, but has voluntarily come into a court of *equity* to ask what may be according to good conscience. It certainly is not in the defendant's mouth to say that the plaintiff should be turned out

of court for not pursuing the harsher course. This court is bound, where it once acquires jurisdiction, to "chancer" away all penalties; and, with this whole case before me, and whether the clause in the deed be construed a *covenant*, or a *condition*, I see no difficulty in decreeing that "to be done which *ought* to be done." Though I am inclined to call it a *condition*, and to hold that, as the present defendant has seen fit to "enter and agree to have the land *by force of the deed*, *he* is bound *to perform the conditions* in the deed;" and that having so made his election, *to have the land*, he is not now to be allowed to change the election, but must abide the result.

Judgment for the plaintiff.

[Rensselaer Special Term, June 1, 1857. *Gould*, Justice.]

Blake *vs.* The City of Brooklyn.

26 301
50 190
90a 410
26 301
65n 235

It is not every wrongful or even unconstitutional act of individuals, and still less of public bodies and municipal corporations, which will entitle the injured party to an injunction.

The plaintiff was the owner of certain lots of land in the city of Brooklyn, worth not over $100 each, and unsalable. The city passed an ordinance requiring these lots to be filled up to within four feet of the street grade, for a distance of 80 feet from the line of the street, in order to support the sidewalks. The plaintiff's lots were taxed $92 each, for filling and grading the street. The street ran past the lots and terminated in a *cul de sac*, at a hill 15 feet high, and the east bounds of the city. *Held* that in the absence of any allegation that the injury occasioned by the filling up of the lots would be irreparable, or that such filling up would cause any damage or injury whatever, to the lots, an injunction to forbid the filling would not lie.

Held also, that an injunction to restrain the collection of an assessment not yet laid, for the expense of such filling, ought not to be granted; it being well settled that a bill in equity and an injunction are not the proper means to review or correct such proceedings of a municipal corporation, unless they are productive of peculiar or irreparable injury, or must lead to a multiplicity of suits.

The party must be left to his common law remedies, in such a case.

Blake *v.* City of Brooklyn.

APPEAL from an order made at a special term, denying a motion for an injunction, and discharging an order for a temporary injunction.

Thompson & Kellogg, for the appellants.

S. E. Johnson and *H. Hagner*, for the respondents.

By the Court, EMOTT, J. The complaint in this action seems to have been framed to restrain the proceedings of the defendants in filling up a portion of the plaintiff's lots, and to vacate the assessment laid for the expense of this filling, as an improper exercise of authority or discretion; although in the argument before us the chief stress was laid upon the unconstitutionality of the ordinance complained of, or the law under which it was made. In any aspect of the question, however, I am quite clear that no case is disclosed upon these papers which demands or justifies the interposition of a court of equity, by injunction. It is not every wrongful or even unconstitutional act of individuals, and still less of public bodies, and municipal corporations, which entitles the injured party to an injunction.

The case is briefly this, on the plaintiff's own showing. He is the owner of certain lots of land on Twentieth street in the city of Brooklyn, worth, he says, not over $100 each, and unsalable at that, and which have been recently taxed $92 each for filling and grading the street. The street runs past these lots and terminates in a *cul de sac*, at a hill and the east bounds of the city, reaching no other road. The defendants have passed an ordinance pursuant to their charter, requiring these lots, with others adjoining, to be filled up to within four feet of the street grade, for a distance of 30 feet from the line of the street, in order, as they say, to support the sidewalks. This filling is to be done at the expense of the owners, the plaintiff and others. It may be inferred from the complaint, although it is not distinctly averred, that

a contract was made by the defendants for filling in these lots according to the ordinance, and that by this contract the expense to the plaintiff would be $62 for each lot. But it is stated that no work was done on the plaintiff's lots under the contract, and that it has expired. Then it is said some negotiations took place which resulted in a compromise, which the plaintiff supposed was binding and would be regarded by the defendants, and under this arrangement he proceeded to fill in his lots, to the required height, for ten feet back from the street line, as I understand him. But now the defendants refuse to ratify this arrangement, and insist on subjecting the plaintiff to the unnecessary expense of filling the lots "according to the ordinance." The complaint then charges that the whole of this filling, and the ordinance directing it, were unnecessary, and unauthorized by law, and if any filling was necessary it was not required to extend so far back from the street. The prayer is for an injunction to forbid the filling, and to restrain the collection of any assessment for its expense.

This is the whole cause of action, and it is manifest that there is nothing here which calls for the relief demanded. The injury to the plaintiff's lots by this filling up is not said to be irreparable so that an action at law and damages for the trespass will not be an ample remedy, if the proceedings of the defendants are unauthorized or unjustifiable. Indeed, there is no statement in the complaint that the filling up these lots will cause any damage or injury whatever to the lands. The gist of the matter seems to be the expense. Even if it were the mere wanton and malicious act of a trespasser, there is not enough in the case to require us to grant an injunction, so far as the lands or lots, or their ownership or enjoyment, are concerned.

As to the tax or assessment, the case is equally plain. If the assessment be illegal or unconstitutional, the plaintiff cannot be compelled to pay it, and he need not anticipate, in this way, his defense to a suit at law. The assessment is not yet laid, or

its amount ascertained; indeed the work is not done, or even commenced, and therefore there cannot be a pretense of a cloud upon the title of the land. If an assessment were laid, however, for the expense of this improvement, it is well settled that a bill in equity and an injunction are not the proper means to review or correct such proceedings of a municipal corporation. There are sufficient common law remedies in such cases, and a court of equity will not extend its jurisdiction to review such proceedings, unless they are productive of peculiar or irreparable injury to the lands of the plaintiff, or must lead to a multiplicity of suits. The case of *The Mayor of Brooklyn* v. *Meserole*, (26 *Wend.* 132,) established this principle. It was followed in the recent case of *Bouton* v. *The City of Brooklyn*, (15 *Barb.* 375.) In the case of *Mace* v. *The Trustees of Newburgh*, I had occasion to apply the rule laid down in these and other authorities, and that decision, denying the continuance of an injunction, was acquiesced in by the very able counsel who argued that case. I think these principles are decisive of the present question, and therefore, without examining the other question discussed by the learned justice at special term, I agree that his order dissolving the injunction was right, and should be affirmed with $10 costs.

[Kings General Term, October 13, 1857. *S. B. Strong, Birdseye* and *Emott*, Justices.]

Livingston *vs.* The Bank of New York.

An affidavit stating "upon information and belief" that a bank is insolvent, is not sufficient evidence to authorize the granting of an injunction and the appointment of a receiver; especially when it is in direct contradiction to the regular official reports of the bank, made under oath.

Where a suspension of specie payments by banks is general, and nearly universal, the mere fact of suspension by a bank of circulation is not proof of insolvency.

Within the meaning of the act of 1849 a bank is clearly solvent, and consequently not to be proceeded against as insolvent, if it has property more than sufficient to satisfy all demands.

In such a case, where no fraud or injustice is alleged, the court will not deem it expedient to grant a temporary injunction, or an order to show cause why an injunction should not be issued; although the bank refuses to redeem its circulating notes in specie.

THIS was an application for an order requiring the defendant to show cause why an injunction should not be granted and a receiver appointed.

John Livingston, for the plaintiff.

ROOSEVELT, J. The plaintiff being, as he alleges, the owner of two "circulation notes" of the Bank of New York, each of the denomination of $100, on the afternoon of the 13th of October, between the hours of one and two o'clock, presented them to the paying teller of the bank, demanding specie for them, and was refused. He further alleges, on information and belief, that the bank is insolvent; and therefore prays that it may be dissolved, that it may be enjoined from exercising any of its corporate functions, from collecting its debts, from paying out or transferring its money and effects, and that its assets may be appropriated to pay its liabilities "according to law." As a preliminary to a final decree, he now moves, *ex parte*, on the sworn statements of his complaint, for an order of the court requiring the bank to show cause, at an early day, why a receiver should not be appointed, "to take charge (in the interim) of its property and effects," and the immediate question is, is such an order, on the case made, a matter of strict legal right, and if not, is it nevertheless, under all the circumstances, fit and proper, as a matter of mere legal discretion. The plaintiff, no doubt, is entitled to the same remedy, by the ordinary suit at law and judgment and execution against the bank, as against any other debtor. He has the advantage, too, in such action, of greater dispatch than an ordinary creditor. He is freed from the common ob-

struction of a sham defense. In *twenty days* after the first step taken, the law declares peremptorily that "judgment *shall* be rendered for such demand with interest and costs, unless the judge shall be satisfied by affidavit, setting forth the facts, that there is a good defense, on the merits, to the demand, and shall thereupon direct a stay of the judgment until a trial can be had. And even in that case—a case seldom likely to occur—the issue joined, whether of fact or law, "*shall* have preference over all other causes." Appeals too—another mode of procrastination—are also restricted, by requiring the certificate of a judge "that there is probable error," and satisfactory security for the payment of the demand, in the event of final judgment, "with interest at the rate of ten per cent, and costs."

These strong provisions to insure a speedy recovery are applicable "to any proceeding for the recovery of any demand" against a bank "issuing any kind of paper credits to circulate as money." And it will thus be seen that, as against that class of banks, every depositor, as well as every bill holder, may ordinarily obtain an execution in twenty days from the time of demand and refusal of specie, (which execution, by the terms of the code, may be made returnable within the further period of sixty days,) and that the time of payment may accordingly, by legal resistance, be postponed in that manner for three months, or thereabouts, and no longer.

Whether these summary requirements of the act of 1849 were intended to apply to the higher courts alone, may admit of some doubt. It is clear, however, that they do not take from the creditor of a bank his ordinary remedy in the minor courts, for $500 and under—a remedy which, without going into details, it is presumed, is at least as prompt as any in the supreme court.

What occasion is there, then, for any extraordinary measures, beyond those already referred to, in favor of the present plaintiff or against the present defendants? The bank, we are told, is insolvent, but how is that shown? The plaintiff's "information and belief" is surely no evidence; espe-

cially when in direct contradiction to the regular official reports of the bank, which, being made under oath, and published by express direction of law, are, it is presumed, entitled to at least as much weight judicially, as the unknown and unsworn informant of the plaintiff.

We are left, then, to the mere legal inference of insolvency, resulting from the suspension of specie payments by a bank of issue.

Is such the necessary inference from suspension, no matter what the bank's assets may amount to, in cases where suspension is general, and nearly universal, throughout the state and every other section of the union? It seems to me that it is not. The statute of 1849, which, being subsequent in time, and especially directed to the case of banks of issue, and covering precisely the same ground, would seem to supersede on these points the older enactments. This statute provides that upon proof by the abortive return of an execution, or by other satisfactory evidence before it is returned, that an execution for "any debt or liability exceeding $100" cannot be satisfied out of any property of the bank thus sued, the judge "shall at once make an order declaring the insolvency of such corporation or association;" to be followed, of course, by the appointment of a receiver, to wind up its business. Under another section, however, a creditor, without waiting the first twenty days, or the subsequent sixty days, if his demand exceed $100, may, at any time after ten days from the refusal of payment, apply for an order enjoining the bank and declaring it insolvent; and on such application the judge, "if in his opinion on the facts presented it be expedient, in order to prevent fraud or injustice," may grant an order for a temporary injunction. After which, on hearing of the parties on short notice, he shall determine whether the bank be "clearly solvent or otherwise." And even if he determine it to be clearly solvent, he is required to continue the temporary injunction, if one have been granted, until full payment of the debts and costs. But if he

determine that it is "not clearly solvent," he must not only continue the injunction, but appoint a receiver.

Reading these provisions, can any one say that, by a true interpretation of the law of which they form a part, the mere suspension of specie payments of itself, and by itself, settles the question of insolvency? If so, why require, under one section, the issuing of an execution and proof of inability to satisfy it; and under another, first a delay of at least ten days, and then a hearing on further notice, and an examination of the "officers' books, papers, accounts, assets and effects?" Banks of issue in this state are the creatures of the law. The same law assumes that while accommodating the public, they will yield an income to the stockholders; and how is such income to be realized unless they are allowed to loan, not only their capital, but a portion at least of their deposits; and that, too, not returnable on demand, but on time? It assumes, therefore, in the very organization of such institutions, that in case of a panic or sudden rush, the banks, although amply able and clearly solvent, may not have specie enough on hand immediately to satisfy all claims. Hence the act of 1849, instead of authorizing a permanent injunction, upon a mere refusal to pay in specie, expressly requires further "proof satisfactory to a justice of the supreme court," that the demand of the plaintiff "cannot be satisfied out of *any property* of the defendant," or that, after a full hearing of the parties, it shall appear, and be so determined, that the institution is "not clearly solvent."

In the present case, it is now admitted that the bank has *property* not only sufficient, but in every respect more than sufficient, to satisfy all demands. Within the meaning of the statute, therefore, it is "clearly solvent," and of course not a subject for the extraordinary decree prayed for in the complaint. For that reason, as well as for the reason that no "fraud or injustice" is alleged or pretended, it is, in my "opinion, on the facts presented," not only "not expedient," but on the contrary highly inexpedient, to grant a "temporary

injunction," or an order to show cause why such an injunction should not be issued.

The revised statutes on this subject, I have said, would seem to have been superseded by the later provisions of the statute of 1849. This position requires some qualification. The late statute is confined to demands "exceeding one hundred dollars," and to "corporations and joint stock associations issuing bank notes;" whereas, the previous statutes were applicable to "*any* creditor" of any amount, and to *any* loan, banking or insurance "corporation," whether issuing notes or not. It must be obvious, however, that where a statute says that a certain thing may be done after twenty days, or after sixty and twenty days, or after ten days and a full hearing of both parties, precisely the same thing cannot be done under a previous statute, *ex parte*, and without waiting eighty, twenty, ten, or any number of days. There is an obvious repugnance, operating to that extent as an implied repeal.

The present application, therefore, in that view also must be dismissed. The plaintiff's demand exceeds $100—it is founded, not on a deposit, but on two circulating notes—and yet it is made, instead of ten days after the refusal of payment, in less than 24 hours. The law, it is true—and the statute of 1849 is certainly not an exception to the principle—aids the vigilant and not the slothful. It is possible, nevertheless, even in such a case, to rise too early.

Banks of issue, it will thus be seen, where they are acting in good faith and are "clearly solvent," have a little time to breathe, after suspension, although not very long. On all except small demands, they must have twenty days, and with the approbation of the sheriff, may have sixty more. And as against all their creditors, except note holders, if certain views of the constitution are correct, the legislature, should they deem the public good to require it, may extend the indulgence still further. On this point, however, I express no opinion, further than to say, that any legislation to be valid must conform, first, to the federal constitution prohibiting all the states

from passing any law "impairing the obligation of contracts;" and secondly, to the state constitution prohibiting the legislature, whatever may be the true interpretation of the prohibition, from passing any law "sanctioning in any manner, directly or indirectly, the suspension of specie payments by any person, corporation or association, issuing bank notes of any description."

[New York Special Term, October 19, 1857. *Roosevelt*, Justice.]

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37 229
36a 356

In the matter of the petition of Benjamin B. Jones *vs.* Alanson Robinson, Receiver of the Hollister Bank of Buffalo.

Where a bank, at the time of its failure, was indebted to J. in the sum of $924, which was then due, and J. owed the bank $391.43 upon a note not then due, but which became due in a few days; *Held* that this was a case of *mutual credit*, and that it was the duty of the receiver of the bank, appointed under the act of 1849, (*Laws of* 1849, *ch.* 226,) to apply a sufficient amount of the sum standing to J.'s credit, on the books of the bank, to the payment and satisfaction of the amount owing by J. upon the note.

ROBINSON was appointed receiver of the property of the Hollister Bank of Buffalo, September 2, 1857. At that time B. B. Jones had credited to his account, as a balance of his deposit, the sum of $924. The bank held a note made by Jones and indorsed by Fish, for $391.43, dated March 3, 1857, payable six months after date, at the Hollister Bank of Buffalo. This note had been discounted by the bank, and was held by it at the time the receiver was appointed, and it became due three days after the plaintiff was appointed receiver. Jones had done business with the bank for a long time previous, and in July made a deposit of over $3000. When his discounted notes became due, the course of the bank was to apply any money Jones had in the bank as a deposit, to the payment of such notes. Jones applied to the

receiver to make an application of a sufficient amount of the $924 appearing to his credit, to the payment and satisfaction of the note of $391.43. The receiver declined to do this, and commenced an action in the superior court of the city of Buffalo, against the maker and indorser, to enforce the payment of the note. And Jones now, by his petition, prayed this court to direct the receiver to make such application, and to discontinue the action commenced by him.

N. A. Hulbert, for petitioner, Jones.

S. G. Haven, for the receiver.

MARVIN, J. Robinson was appointed receiver under the act of 1849, (*Sess. Laws, p.* 340.) The 11th section specifies some of the powers and duties of the receiver. It is declared that he shall possess all the powers of receivers of corporations, under the 3d article of title 4 of chapter 8, part third of the revised statutes, in respect to the settlement of all demands exhibited to him, and in all other respects, except as therein otherwise provided; and all such powers now conferred by law on trustees of insolvent debtors as may be applicable, &c.

On turning to article 3 of the revised statutes, above referred to, it will be seen that the receivers therein mentioned, have all the power and authority conferred by law upon trustees to whom the assignment of the estate of insolvent debtors may be made, pursuant to the provisions of the 5th chapter of the second part of the revised statutes. They are declared to be trustees for the benefit of the creditors of the corporation and its stockholders. (2 *R. S.* 469, §§ 67, 68.) Turn now to the 5th chapter, second part, of the revised statutes, and ascertain the powers of trustees under assignments made by insolvent debtors, &c. It is declared (2 *R. S.* 47, § 36) that when mutual credit has been given by any debtor, and any other person, or mutual debts

have subsisted between such debtor and any other person, the trustees may set off such credits or debts, and pay the proportion or receive the balance due. This provision contains an exception not material in this inquiry, and a qualification to be hereafter noticed. Had not *mutual credit* been given by the bank and the defendant Jones? The language of the English act of bankruptcy is, "when there has been mutual credit given by the bankrupt and any other person, or when there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set off against another." There is a wide distinction between *mutual debts* and *mutual credits;* the latter embracing many cases not included in the former. In *Ex parte Prescott*, (1 *Atk.* 230,) a person owed the bankrupt a sum payable at a future day, and the bankrupt was indebted to him in a smaller sum, then due. Lord Hardwicke held that although it was not a case strictly of *mutual debts*, it was a case of *mutual credits*, and the sum owing by the bankrupt was set off and applied upon the demand owing to the bankrupt, not then due. This case is in point. In *Hankey and others* v. *Smith and others*, (3 *T. R.* 507, *note*,) the defendants held a bill accepted by the bankrupts, *not due* when the commission of bankruptcy issued. The defendants made purchases of the bankrupts, on credit, before the commission of bankruptcy. The action was brought by the assignees of the bankrupts, to recover the price of the goods sold, and it was held that *mutual credits* existed between the persons who became bankrupt and the defendants who held their acceptance, not then due, and that the defendants could set off the acceptance. At the time the goods were sold to the defendants, the vendors did not know that the defendants held their acceptance. The court held that this made no difference; that the mutual credit was constituted by taking the bill, on the one hand, and selling the goods, on the other.

In *Smith and others, assignees,* v. *Hudson,* (4 *T. R.* 211,)

the defendant had lent to the bankrupts his acceptance, which did not become due until after the act of bankruptcy, and was then outstanding in the hands of third persons, and the defendant paid the bill, and it was held that he was entitled to set off the amount thus paid, after the commission issued, in an action by the assignees against him for goods purchased by him of the bankrupts; and that this was so under the words "*mutual credit*," used in the act. See also *Wagstaff ex parte*, (13 *Vesey*, 65,) *Atkinson and others, assignees*, v. *Elliott*, (7 *T. R.* 378,) a case where the debt of the defendant was due at the time of the bankruptcy, to the bankrupt, and the bankrupt owed him a debt not then due. It was held that the defendant might retain the money in his hands owing to the bankrupt, to satisfy his demand against the bankrupt, not due. (*Olive* v. *Smith*, 5 *Taunt.* 56. *Sheldon* v. *Rothschild*, 8 *id.* 156. *Arbouin* v. *Tritton*, 1 *Holt's N. P. C.* 408. *Russell* v. *Bell*, 8 *Mees. & Wels.* 277.)

The cases here cited establish most clearly that a case of *mutual credit* existed between the bank and Jones, at the time the receiver was appointed. The bank was indebted to Jones in the sum of $924, which was then due, and Jones owed the bank $391.43, not then due, but which became due in a few days—that constituting a mutual credit, according to the construction put upon those words as used in the English bankrupt act; and I have no doubt we should give the same construction to our statute. It is quite evident, from the language used in our statute, that the provision we are considering was taken, originally, from the English bankrupt act, and with a full knowledge of the construction which had been given to that act.

The section we have been considering, in relation to mutual credits or mutual debts, contains the qualification that "no set off shall be allowed of any *claim* or debt which would not have been entitled to a dividend, as hereinbefore directed." These provisions are contained in article 8 of the code of laws relating to absent debtors, &c. and to insolvents; and in this

article the persons who are entitled to dividends in the proceeding under each article, are specified and defined. It is sufficient here to say, that Jones would have been entitled to a dividend under any of the articles in the revised statutes, except the sixth; and the cases provided for in that article are excepted in section 36.

It may be well here to notice section seven in this 8th article, (2 *R. S.* 41,) conferring power upon the trustees to sue in their own names, &c., and declaring that "no set off shall be allowed in any such suit, for any debt, unless it was owing to such creditor, by such debtor, before the first publication of the notice required in the first article," &c. proceeding to fix a time as to the proceedings under the other articles; and to remark that it may be that this provision restricts the operations of this act in certain cases within narrower bounds, touching set-off, than the English act of bankruptcy; so that some of the cases above cited may not be applicable. Thus, as I understand the English cases, if A., the bankrupt, was indebted to B., the debt not being due when A. became a bankrupt, and B. was indebted to A., the debt being due, in an action by the assignees of the bankrupt against B., he would be permitted to retain the amount A. owed him, and apply it upon the debt he owed A., and this under the provision as to *mutual credit*. Now has the provision in section 7 of our act so qualified section 36, containing the words "mutual credit," as to exclude the case supposed of A. and B.? It is not necessary to express any opinion upon that question in this case. The bank owed Jones, and the debt was due at the time the receiver was appointed.

In *Holbrook* v. *The Receivers of the Am. Fire Ins. Co.*, (6 *Paige*, 220,) the plaintiff was indebted to the insurance company upon a bond and mortgage not due when the receiver was appointed, and the insurance company was indebted to the plaintiff in a larger sum, for losses. The sum owing to the plaintiff had not been *liquidated*, and could not, there-

fore, be used as a set-off to the bond and mortgage under the general provisions of the statute relating to set-off. The law under which the receiver in that case was appointed, as in the present case, had conferred upon the receiver the powers conferred upon trustees in cases of insolvent or absconding, &c. debtors; and the chancellor applied the provision of the statute in relation to *mutual credit*, and directed the set-off. The case is in point. There the bond and mortgage became due after the receiver was appointed, and a sufficient portion of the amount owing by the insolvent insurance company to the mortgagor was directed to be applied to the payment of the bond and mortgage.

In the view I have taken of this case, I think there was no legal necessity for Jones to come into this court. He can defend the action pending against him in the superior court, where his set-off, upon the principles of *mutual credit*, would be allowed. This point was not made, and I understood counsel to waive all objections except that arising upon the merits. The motion must be granted, with $10 costs, to be paid by the receiver, and to be allowed to him out of the trust funds.(*a*)

(*a*) No appeal was taken from this decision.

[Erie Special Term, November 2, 1857. *Marvin*, Justice.

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31 520
31 546
57 145
1L 59
3h 25
10h 291
13h 463
29h 656
52h 325
26a 448
33a 692
70a 485
74a 558
78a 285

LUCINDA WILLCOX, administratrix of Whitman Willcox, jun deceased, *vs.* ELISHA B. SMITH and WHITMAN WILLCOX, administrators of Whitman Willcox, jun. deceased, and others.

WHITMAN WILLCOX, administrator, &c., *vs.* ELISHA B. SMITH, administrator, and LUCINDA WILLCOX, administratrix, &c., and others.

SHERWOOD S. MERRITT and MARY ANN his wife *vs.* ELISHA B. SMITH and others, administrators, &c., and others.

BRADFORD WILLCOX *vs.* THE SAME.

CHARLES WILLCOX, by Henry M. Hyde his special guardian, *vs.* THE SAME.

Upon an appeal from an order or decree of a surrogate, all persons to whom sums are awarded by the surrogate, and who are therefore interested in sustaining his decree, should be made parties respondents, in the petition of appeal; although they were not parties to the proceedings before the surrogate.

The creditors, whose debts a surrogate may direct the administrators to pay, on a final settlement of their accounts, are those whose claims arise on contracts made with the deceased; and not such as have demands against the administrators personally. by reason of agreements made between them and the administrators, even while the latter were in the proper discharge of their duties.

Where administrators employ counsel to assist them in arranging, substantiating and settling their accounts before the surrogate, on final settlement, they are personally liable to pay such counsel for their disbursements and services; and it is not in the power of such administrators to make an agreement with their counsel on which the latter can found any claim against the estate of the deceased.

Under such circumstances, the counsel are not creditors of the deceased; nor can they make any claim against his estate, for services thus rendered to the administrators.

Counsel, not being *parties* to proceedings before a surrogate on a final accounting, cannot have costs awarded to them; inasmuch as the statute only authorizes the surrogate to award costs to *parties*. And costs, when adjudged to a party, by the surrogate, are such, only, as were formerly allowed for similar services in the late courts of common pleas.

An executor or administrator is not entitled to charge the estate with a counsel fee paid by him upon the final settlement of his accounts before the surrogate; or for drawing up his accounts in a proper and legal form, on such a settlement. Nor has the surrogate any authority to make an arbitrary

allowance to him in lieu of the compensation directed by the statute to be paid to advocates and proctors in surrogates' courts, where the same is to be paid as costs in the suit or proceeding, either by the adverse party, or out of the fund in litigation.

Where administrators took out letters of administration on the 1st of September, 1845, and although it was their duty to return an inventory of the personal estate within three months from that time, they had not even made oath to the accuracy of the inventory in 1852 when the next of kin commenced proceedings before the surrogate to compel them to return it; and they did not file their inventory, until the 5th of January, 1853, although there was no reasonable excuse for such delay; and their oaths, which they attached to the inventory, were contradictory, and varied from the requirements of the statute; two of them swearing that S. had been the *acting* administrator and that they made their oath as to the correctness of the inventory, from the best of their knowledge, information and belief, and under the advice of counsel that the same was not conclusive upon them; and S. swearing that he had but little knowledge of the property of the deceased, previous to his appointment as administrator; that all the notes, accounts &c. appraised, and most of the personal property, were in the possession of his co-administrators, or one of them, who had been the acting administrators, and that he, S., had not been, at any time, sole acting administrator, according to his best knowledge and belief; but that he supposed, at all times, the three were acting conjointly; and that he made his affidavit under the advice of counsel, and claimed that he was not concluded by the same; and it appeared that the administrators had been remiss in collecting debts due to the deceased, in paying those contracted by him, in converting the personal property into money, and in taking vouchers for moneys paid out by them; and that they had applied some of the personal estate to uses not authorized by law, and had unnecessarily permitted the same to decrease in their hands; *Held*, that it was not a case in which the surrogate should have allowed the administrators any costs whatever, out of the estate, on the final settlement of their accounts, beyond the fees of the auditor and himself.

Held also, that the contestants were entitled to costs, to be paid out of the estate of the deceased; and that the surrogate should have awarded costs to them.

The decision of a surrogate, awarding costs on the final settlement of the accounts of administrators, may be reviewed on appeal.

Where a note was made on the 31st of August, 1847, by which the maker promised to pay S. $1200 on demand, with interest, which remained unpaid at the death of the maker, and when letters of administration upon his estate were issued; and on the 31st of August, 1847, one of the administrators paid the interest then due on the note, and he continued to pay interest on it until 1852; *Held* that the inference was irresistible that S. presented the note to the administrators within seven years and a half next after its

date, and that they allowed it as a valid claim against the estate of the deceased.

Held also, that S.'s cliam upon such note having been duly recognized and allowed by the administrators as a valid claim against the estate, within seven and a half years from the time it became due, and their final accounting and settlement having been made within six years from the time of such allowance, the next of kin could not require its rejection by the surrogate on the plea of the statute of limitations. That under such circumstances neither they, nor the administrators, could set up the statute, against the claim.

Where no sufficient excuse is given, by administrators, for not paying a note of their intestate, within eighteen months from the time of their appointment, they should be charged personally, by the surrogate, with all interest that has accrued on it since the expiration of the eighteen months.

An executor or administrator who is the general guardian of an infant, cannot, of his own motion, transfer any portion of the personal estate of the deceased, in which his ward has an interest as next of kin or legatee, from himself as executor or administrator to himself as general guardian of the infant, so as to relieve himself from accounting for all of such personal estate, as executor or administrator, before the surrogate. He must keep, as executor or administrator, that portion of the estate which belongs to his ward, until he has authority from the surrogate to hold it as general guardian.

He cannot make any contract, as guardian, with himself as administrator, which will be binding on his ward. He cannot therefore give a receipt as guardian, to himself as administrator, which will be evidence against his ward, of the payment of the sum mentioned therein, by himself as administrator. The law will not permit him thus to act in a double capacity.

Upon the final accounting and settlement of executors or administrators, the next of kin to the deceased may set up the statute of limitations against the allowance of a claim presented by an administrator, for moneys alleged to have been paid by him upon a debt of the decedent.

Executors and administrators have no authority or control over the real estate left by the deceased, except to mortgage, lease or sell it for the payment of his debts, when specially authorized to do so by the surrogate. They are not warranted in paying any taxes on it, assessed subsequent to the death of the deceased, or in making payments upon mortgages, on real estate conveyed by him, or whereof he died seised, which he was under no personal obligation to pay.

An administrator, as such, has no right to purchase, with the funds of the estate, the interest of an individual, as next of kin, in the personal estate of the deceased, for his co-administrators, or for the heirs and next of kin; and his co-administrators have no power, even with the express consent of all the heirs and next of kin and their guardians, to authorize him to purchase, as administrator, the interests of another in either the real or the personal estate of the deceased. Nor has the surrogate power to authorize

him to do it. Such a purchase is not an act which an administrator can do in his representative character. And he cannot be allowed the sum expended in making such purchase, on the settlement of his accounts.

The statute is imperative that every executor or administrator, in rendering his accounts to the surrogate, on a final settlement, *shall* produce vouchers for all debts and legacies paid, and for all funeral charges and just and necessary expenses. If an account can be allowed in any case, without vouchers and without proof other than the oath of the executor or administrator, where separate items of it exceed $20 in amount, *it seems* it is where creditors refuse to give vouchers; or where the executor or administrator has lost his vouchers; or where they have been stolen or destroyed, and he is unable to procure others.

Executors and administrators, being all equally liable, *prima facie*, to creditors and the next of kin, for the property mentioned in the inventory, are not competent witnesses for each other on their final accounting before the auditor and the surrogate.

They are not competent witnesses for each other under the common law rules of evidence, or the statutes relating to proceedings before surrogates; and the code of procedure has no application to proceedings in surrogates' courts.

Where administrators have given a joint bond, conditioned for the faithful performance of their trust, a surety in such bond is not a competent witness for the administrators, or either of them, on their final accounting.

The mode in which executors and administrators should make up their accounts.

THE above entitled causes are five appeals from the decree of the county judge of Chenango county, made by him while acting as surrogate of that county, on the 29th day of December, 1855, upon the final accounting and settlement of Lucinda Willcox, administratrix, and Elisha B. Smith and Whitman Willcox, administrators of the goods, chattels and credits of Whitman Willcox, jun. deceased.

Whitman Willcox, jun. died intestate, at Norwich, in the county of Chenango, on the 4th day of August, 1845. On the 1st day of September, in that year, the above named Lucinda Willcox, Elisha B. Smith and Whitman Willcox were appointed administratrix and administrators of the goods, chattels and credits of the deceased, by the county judge of Chenango county, acting as surrogate of that county; and on the same day such county judge, as surrogate, appointed appraisers of the personal property of the deceased. The

appraisers commenced taking an inventory of such property on the 8th day of September, 1845; but the inventory, which they made, was not sworn to by the administratrix and administrators until the 4th day of January, 1853. It was filed in the surrogate's office on the 5th day of January, 1853; but it was not sworn to or returned to the surrogate, until after some of the next of kin to the deceased instituted proceedings before the surrogate to compel the administratrix and administrators to file it. The inventory showed that the appraised value of the personal estate of the deceased exceeded $42,000. The deceased left surviving him, Lucinda Willcox his widow, Lucinda P. Smith, wife of Elisha B. Smith, Whitman Willcox, Eli H. Willcox, Mary Ann Willcox now wife of Sherwood S. Merritt, Gurdon H. Willcox, Bradford Willcox and Charles Willcox, his sons and daughters and only heirs at law. Each of the sons and daughters of the deceased were minors, at the time of his death, except Lucinda P. Smith and Whitman Willcox. On the 27th day of November, 1845, the county judge of Chenango county, acting as surrogate, appointed Benjamin F. Rexford the general guardian of Eli H. Willcox; Elisha B. Smith the general guardian of Gurdon H. Willcox and Mary Ann Willcox; and Whitman Willcox the general guardian of Bradford Willcox and Charles Willcox. In the year 1847, Elisha B. Smith was appointed the special guardian of Mary Ann Willcox and Gurdon H. Willcox, who were still infants, for the purpose of selling certain real estate, descended to them as heirs at law of the deceased; and in the same year Whitman Willcox was appointed the special guardian of Bradford Willcox and Charles Willcox, who were yet infants, for the purpose of selling certain real estate, descended to them as heirs at law of the deceased. They afterwards, as such special guardians, sold such real estate and received the consideration therefor; and they have not, either as special or general guardians, settled with Mary Ann Willcox, now Mary Ann Merritt, Bradford Willcox and Charles Willcox, or either of them.

Mary Ann Willcox was married to Sherwood S. Merritt on the 13th day of May, 1851. Mrs. Merritt became 21 years of age on the 21st day of March, 1848. Neither Bradford nor Charles Willcox was 21 years of age when the surrogate made the decree appealed from. The citation, for the final settlement of the accounts of the administratrix and administrators as such, was issued, at their instance, by the county judge, acting as surrogate, on the 5th day of January, 1853; and on the 23d day of May, in that year, the administrators and administratrix, as such, severally filed their separate accounts with the surrogate. Mary Ann Merritt and her husband, Bradford Willcox, and Charles Willcox, by guardians *ad litem*, disputed and contested each of the accounts of the administrators and administratrix as rendered; and they severally filed objections to each of them: and thereupon the county judge, acting as surrogate, referred the several accounts to an auditor to examine and report thereon.

Elisha B. Smith claimed, on the final accounting before the surrogate, that the deceased was indebted to him, at the time of his death, in the sum of $735.59, for money which he paid to the Bank of Chenango, on a note of the deceased, on the 8th day of July, 1845. The contestants insisted that this claim was barred by the statute of limitations; but it was allowed to Smith by the surrogate, in his final decree.

On the 26th day of September, 1853, the surrogate, after hearing all parties having an interest in the matter, audited and allowed an account at $1860.70 presented by Whitman Willcox against the deceased, the last item of which accrued April 3, 1845; and the surrogate ordered that Whitman Willcox might retain the sum of $1860.70, and interest thereon from the 26th day of September, 1853, out of the assets of the deceased in his hands. The auditor in his report recognized this claim as a valid one against the estate of the deceased; but the surrogate overlooked it, or at all events did not allow it to Whitman Willcox, in making up his final decree. The statute of limitations was not interposed against

this claim, when it was audited and allowed by the surrogate; nor on the hearing before the auditor; and the order of the surrogate allowing Whitman Willcox to retain it, out of assets of the deceased in his hands, had never been appealed from.

In January, 1852, Eli H. Willcox, who was then of full age, conveyed, by deed in due form, all his interest in the real and personal estate of the deceased to Lucinda Willcox, Lucinda P. Smith, Whitman Willcox, Mary Ann Merritt, Gurdon H. Willcox, Bradford Willcox and Charles Willcox. The deed recited a consideration of $5965.21. Elisha B. Smith claimed, before the auditor and surrogate, that he, as administrator, paid $5512.20 of this consideration to Eli H. Wilcox, with money and property belonging to the estate, at different times between May 26, 1846, and the 6th day of December, 1849; and that Lucinda Willcox, Mary Ann Merritt and Lucinda P. Smith expressly accepted the conveyance made to them by Eli H. Willcox, and that the general guardians of the minor heirs and next of kin to the deceased also accepted such conveyance. The surrogate allowed and credited to Elisha B. Smith the above mentioned $5512.20, as money and property legally paid out by him as administrator, notwithstanding objections were made thereto by the contestants of the accounts of the administratrix and administrators.

The auditor took such evidence as was offered before him, from time to time, by the parties. Whitman Willcox, one of the administrators, was sworn and examined as a witness before the auditor, for Lucinda P. Smith and for himself, and also for Lucinda Willcox, administratrix, and testified generally in the case, under objections and exceptions taken by the counsel of Mary Ann Merritt, Bradford Willcox and Charles Willcox. Lucinda P. Smith did not file any objections to the accounts of the administrators or administratrix, or to the auditor's report; and neither she nor her husband, Elisha B. Smith, has appealed from the final decree of the surrogate. Elisha B. Smith, one of the administrators, was sworn and examined before the auditor as a witness for his co-administra-

tor and the administratrix, and generally in the case, under objections and exceptions taken by counsel for Mary Ann Merritt, Bradford Willcox and Charles Willcox. Benjamin F. Rexford, Esq., who was one of the sureties to the bond of the administrators and administratrix, was examined as a witness before the auditor and surrogate, for the administrators and administratrix, under objections and exceptions taken by counsel for Mary Ann Merritt, Bradford Willcox and Charles Willcox. Lucinda Willcox, the administratrix, was sworn and examined before the auditor as a witness for herself and her co-administrator, Whitman Willcox, under objections and exceptions taken by counsel for Mary Ann Merritt, Bradford Willcox and Charles Willcox. Motions were made, by such counsel, to strike out the evidence of the administrators and administratrix, and their admissions which they made, as to the correctness of some parts of each other's accounts and claims; and also to strike out the evidence of Rexford; but such motions were denied by the auditor, and exceptions were taken by such counsel. The surrogate acted on such evidence, notwithstanding objections were made thereto by counsel for Mary Ann Merritt, Bradford Willcox and Charles Willcox. A voucher, on which the surrogate credited Smith $1000 as administrator, and charged Mary Ann Merritt the same amount as next of kin to the deceased, was in the form following, to wit:

"Elisha B. Smith, guardian of Mary Ann Merritt, formerly Mary Ann Willcox, to Elisha B. Smith, administrator of Whitman Willcox, jr. Dr.

Sept. 15, 1845, one piano	$100 00
Jan. 1, 1846, cash	200 00
July 1, 1846, "	200 00
Jan. 1, 1847, "	200 00
July 1, 1847, "	100 00
Jan. 1, 1848, "	200 00
	$1000 00

Received of Elisha B. Smith, administrator of Whitman Willcox, jr. deceased, the property and money above mentioned, and at the times mentioned, as towards the share of said Mary Ann in the estate of Whitman Willcox, jr. deceased." (Signed,) "Elisha B. Smith, general guardian of Mary Ann Merritt, formerly Mary Ann Willcox."

Some of the vouchers of the administrators were obtained long after the transactions occurred to which they related.

Smith charged to Bradford Willcox, and was credited as administrator by the surrogate, with $1213.42, for money and property he alleged he had paid or advanced to Bradford, while Whitman Willcox was his general guardian. Lucinda Willcox charged to Bradford, and was credited as administratrix, by the surrogate, with $589.78, "for cash, board and other expenses," she alleged she had paid or advanced to Bradford, out of moneys belonging to the estate, while Whitman Willcox was his general guardian. In like manner she charged $589.78 to Charles Willcox, and was credited therefor, as administratrix, by the surrogate, while Whitman Willcox was his general guardian. Lucinda P. Smith became the owner of the interests of Gurdon H. Willcox, in the real and personal estate of the deceased, before the administrators and administratrix rendered their accounts to the surrogate.

The auditor's report bears date the 1st day of December, 1854; but it was not filed with the surrogate until the 22d day of February, 1855. It contained a statement showing that Lucinda Willcox, as widow of the deceased, was entitled to $150 worth of the personal property of the deceased, under chapter 157 of the laws of 1842; and other articles of such property, of the value of $192.25, in addition thereto, under the revised statutes. That all of such property and articles were appraised as assets, when the same should have been included and stated in the inventory without being appraised. The auditor was of the opinion, notwithstanding the inventory, that Lucinda Willcox, as widow, was entitled to retain such property and articles, which, in the aggregate, were of

the value of $342.25. The surrogate took no notice of this part of the auditor's report, and did not in any way credit or allow Mrs. Willcox for such property or articles, either as widow or administratrix.

Henry Snow held a note against the deceased for the payment of $1200 to him on demand, with interest. It was dated the 31st day of August, 1843. Smith, as one of the administrators, paid interest on it at different times, but had not paid the principal. It was presented to the surrogate by Smith, as a demand due from the deceased, and unpaid. It was objected to by the next of kin, on the ground that the claim, upon the note against the estate, was barred by the statute of limitations. The objection was overruled, and the claim was adjudged valid to the amount of $1480.

The administrators and administratrix did not present vouchers for all payments alleged to have been made by them as such, exceeding $20; and the aggregate for which no vouchers were produced, exceeded $500.

Many debts appraised as due the deceased and collectible, had not been collected; and the next of kin contended, before the auditor and surrogate, that no sufficient excuse was shown, or properly shown, for not collecting such debts. And the next of kin also insisted, before the auditor and surrogate, that some of the personal property was not legally accounted for; and that considerable amounts had been lost by the inexcusable negligence of the administrators and administratrix. The auditor's fees were fixed by stipulation.

Mary Ann Merritt, Bradford Willcox and Charles Willcox, *each*, filed 112 exceptions to the auditor's report; Elisha B. Smith filed 31 exceptions to such report; Whitman Willcox filed 6 exceptions, and Lucinda Willcox filed 8 exceptions to such report.

Benjamin F. Rexford acted as counsel for Elisha B. Smith, and *quasi* for his wife, on the accounting before the auditor and surrogate; and he presented an account to the surrogate, against the adminstrators and administratrix, for $714.71,

for expenses incurred and services rendered by him on such accounting. $10 a day was charged by Rexford for his services, exclusive of disbursements. Henry R. Mygatt acted as counsel for Lucinda and Whitman Willcox on their accounting, before the auditor and surrogate; and for such services and his expenses incurred by him in rendering the same, he presented an account to the surrogate, against the administrators and administratrix, amounting to $601.55. His services were charged at $5 per day, besides expenses.

The surrogate's decree stated, 1st. That the whole amount received by the administrators and administratrix, "from the assets of the estate," including what he charged to them "of interest," amounted to $36,948.84. That he allowed commissions on this sum to the amount of $469.48; of which he gave Smith three-fourths, and the other administrator and administratrix one-eighth each.

The decree further showed, that Smith had received, as administrator of the assets of the deceased, the sum of $21,613.30. That he had paid $11,849.60 of debts due from the deceased. That he had also paid $1266.57 expenses of the administration. That he had paid to Eli H. Willcox, for his interest in the real and personal estate of the deceased, $5512.20. That he had paid to Mary Ann Merritt $1000. That he had paid to Bradford Willcox $1213.42. And that the estate was indebted to Smith in the sum of $4753.59.

The decree also stated that Lucinda Willcox had received, as administratrix, of the assets of the deceased, $4491.16; that she had paid as follows, to wit: For debts of the estate, $198.33; to Eli H. Willcox $616.12, in the same manner that Smith had paid him the $5512.20 above mentioned; to Mary Ann Merritt $337.35; to Gurdon H. Willcox $554.29; to Bradford Willcox $589.78; to Charles Willcox $589.78; and that Lucinda Willcox was indebted to the estate in the sum of $3410.18.

The decree further declared that Whitman Willcox had

received as administrator, of the assets of the deceased, the sum of $4031.33; that he had paid of debts due from the deceased the sum of $3507.52; and that there was due from him to the estate the sum of $2593.20.

The decree further stated that Lucinda Willcox and Whitman Willcox had received, as administratrix and administrator, jointly, of the assets of the deceased, the sum of $2104.61; also that Smith and Whitman Willcox had received as administrators, jointly, of the assets of the deceased, the sum of $1185.12.

The decree further showed that demands to the amount of $1048.32 were due the estate and not collected, for which the administrators and administratrix were equally liable. That there was due from the estate to Henry Snow, on the note hereinbefore mentioned, the sum of $1480.

The decree made Mary Ann Merritt indebted to the estate in the sum of $911.52, and Bradford Willcox indebted to it in the sum of $1091.89. The decree required the persons indebted to the estate to pay Henry Snow his claim of $1480, above mentioned; to Benjamin F. Rexford his claim of $705.60 for services and disbursements; to Henry R. Mygatt his claim of $601.55 for services and disbursements; to Elisha B. Smith his claim of $4753.59, as above stated; which sums, the decree declared, were due to such persons from the estate of the deceased; to Lucinda P. Smith $3.40, and to Charles Willcox $462 57, to complete their distributive shares in the estate of the deceased.

Other provisions were contained in the decree, and some portions of it are not easily understood. Some parts of it are more particularly noticed in the following opinions of the court. The decree differed widely from the auditor's report. The entire case, aside from the voluminous points, contained 2883 folios. It was filled with objections and exceptions; and there were multitudes of alleged errors specified in the petitions of appeal.

Mary Ann Merritt, Bradford Willcox, Charles Willcox, Lu-

cinda Willcox and Whitman Willcox severally appealed from the decree of the surrogate to this court. Smith alleged in his answers to the petitions of appeal, that the surrogate had committed errors in his decision, adverse to his interests, and asked to have them rectified.

The other facts, necessary to a correct understanding of the questions determined in the case, sufficiently appear in the opinion of Justice BALCOM.

Henry R. Mygatt, for Whitman Willcox and Lucinda Willcox.

Rexford & Kingsley, for Benjamin F. Rexford, Lucinda P. Smith, Elisha B. Smith and Henry Snow.

Henry Van Der Lyn, for Henry R. Mygatt.

Henry C. Goodwin, *Sherwood S. Merritt* and *John Wait*, for Mary Ann Merritt, Bradford Willcox and Charles Willcox.

BALCOM, J. The decree of the surrogate states that there is due from the estate of Whitman Willcox, jun. deceased, to Henry Snow, on a note executed by the deceased to him, the sum of $1480; that there is due to Benjamin F. Rexford from such estate the sum of $705.60; and that there is due from such estate to Henry R. Mygatt, for services rendered in settling the same, the sum of $601.55; which several sums the decree declares shall be paid from the estate of the deceased. These sums are decreed in favor of Snow, Rexford and Mygatt, against such estate, although the decree requires Lucinda Willcox, Mary Ann Merritt, Whitman Willcox and Bradford Willcox to pay such sums: for it declares that they owe the estate sufficient moneys to satisfy such sums. Rexford and Mygatt were not parties to the proceedings before the surrogate, and could not have been legally made such; but the surrogate having, by

the decree, awarded them the sums above mentioned, they, as well as Snow, are interested in sustaining the decree; and therefore they were properly made parties respondents in the petitions of appeal to this court. (1 *Barb. Ch. Pr.* 428. *Gilchrist* v. *Rea*, 9 *Paige*, 66. *Kellett* v. *Rathbun*, 4 *id.* 102. *Gardner* v. *Gardner*, 5 *id.* 170.)

Rexford's claim, adjudged to him by the decree, as well as Mygatt's, was for disbursements paid and services rendered for the administrators and administratrix on their final accounting and settlement before the surrogate; therefore neither Rexford nor Mygatt was a creditor of the deceased, and neither of them had any claim against his estate. The administrators and administratrix employed them as counsel, to assist in arranging, substantiating and settling their accounts before the surrogate: and they were personally liable to pay Rexford and Mygatt for their disbursements and services in those proceedings. And it was not in the power of the administrators and administratrix to make an agreement with Rexford and Mygatt, on which they could have any claim against the estate of the deceased. No persons could have claims against the estate of the deceased, arising on contract, except those who made contracts with him, and such as succeeded to their rights.

The creditors, to whom the surrogate is authorized to decree the payment of debts by executors and administrators, on a final settlement of their accounts, are those whose claims arise on contracts made with the deceased; and not such as have demands against the executors or administrators personally, by reason of agreements which they have made with the executors or administrators, even while in the proper discharge of their duties in administering upon the estates under their control. (*See* 2 *R. S.* 95, § 71.)

Rexford and Mygatt, not being parties to the proceedings before the surrogate, could not have costs awarded to them, because the statute only authorizes the surrogate to award costs to *parties*. (2 *R. S.* 223, § 10.) And costs, when adjudged to a party by the surrogate, are such, only, as were

formerly allowed for similar services in the late courts of common pleas. (*Laws of* 1837, *ch.* 460, § 70. *Sherman* v. *Youngs*, 6 *How. Pr. R.* 318. *Burtis* v. *Dodge*, 1 *Barb. Ch.* 77. *Halsey* v. *Van Amringe*, 6 *Paige*, 12. 3 *id.* 182. *Western* v. *Romaine*, 1 *Bradf.* 37.) They must still be taxed at the rates of common pleas costs, as they were allowed prior to the code. (*See authorities above cited.*) This is certainly the rule; for the reason that the second part of the code, which includes that portion thereof that allows and regulates costs in civil actions, is inapplicable to proceedings in surrogates' courts, and does not affect appeals from such courts. (*Code*, § 471. 6 *How. Pr. Rep.* 318.)

It seems to be well settled that an executor or administrator is not entitled to charge the estate he represents with a counsel fee paid by him upon the final settlement of his accounts before the surrogate; or for drawing up his accounts in a proper and legal form on such a settlement; and also that the surrogate has no authority to make an arbitrary allowance to him in lieu of the compensation directed by the statute to be paid to advocates and proctors in surrogates' courts, where the same is to be paid as costs in the suit or proceeding, either by the adverse party, or out of the fund in litigation. (*Burtis* v. *Dodge*, 1 *Barb. Ch.* 77. *Halsey* v. *Van Amringe*, 6 *Paige*, 12. 1 *Bradf.* 37.) This rule does not conflict with the one, now statutory, which authorizes the surrogate to allow executors and administrators "for their actual and necessary expenses," which are "just and reasonable," in the management of the estates committed to them; (*see* 2 *R. S.* 93, § 58; *Laws of* 1849, *ch.* 160;) such as expenses incurred by them, in employing agents and clerks, where their services are beneficial to such estates; (*McWhorter* v. *Benson*, *Hopkins' Ch.* 28; *Vanderheyden* v. *Vanderheyden*, 2 *Paige*, 287; 9 *id.* 440; 2 *Denio*, 575; 2 *Bradford*, 291, 294;) and such as costs paid in actions brought by them, in good faith, to recover debts supposed to be due to their decedents, when the results show that different modes of proceeding would have been more

beneficial to the parties interested in the estates. (*Collins* v *Hoxie*, 9 *Paige*, 81.)

The two rules already mentioned harmonize; and they are founded on solid reasons. It is not often that executors or administrators need the services of counsel in making final settlements of their accounts before the surrogate, if they have properly managed the estates in their hands, and are diligent in making such settlements; and where they are negligent, or permit their accounts to become confused, or suffer the estates under their control to decrease unnecessarily, they ought to pay counsel out of their own funds, for assisting them in closing up their trusts. And the reasons are too obvious to be stated, which uphold the rule that permits the surrogate to allow them all actual and necessary expenses incurred by them, which appear reasonable and just, in bringing and defending actions, in good faith, with the expectation of benefiting the estates under their control; and in managing such estates, solely for the benefit of those interested in them.

The preceding conclusions render it apparent that the surrogate had no authority to award costs to either Rexford or Mygatt, for disbursements paid and services rendered by them for the administrators and administratrix, on their final accounting and settlement before him; and also, if he had adjudged costs for their disbursements and services, to the administrators and administratrix, the decree could not be sustained; because he taxed Rexford and Mygatt's charges for services by the day, and included in their bills, as disbursements, moneys paid by them for the use of horses and wagons, for horse feed and for their own board. (*See Kirtland's Surrogate*, 103.)

But I will not stop here on the question of costs; for I am of the opinion the surrogate could not, upon the facts in the case, award even taxable costs to the administrators and administratrix, to be paid out of the estate of the deceased, or personally by the contestants of their accounts.

The administrators and administratrix took their letters of

administration from the surrogate on the 1st day of September, 1845, when the contestants were all infants. The statute made it their duty to return an inventory of the personal estate of the deceased "to the surrogate within three months of the date of such letters;" (2 *R. S.* 84, § 15;) but they had not even made oath to its accuracy in 1852, when the contestants, as next of kin to the deceased, commenced proceedings before the surrogate to compel them to return it; and they did not file it with the surrogate until the 5th day of January, 1853; and they had no reasonable excuse or apology for this long delay. Their oaths, which they attached to the inventory, are contradictory, and vary from the requirements of the statute. (2 *R. S.* 84, § 16.) Two of them swore that Smith had been *the acting administrator of the estate*, and that they made their oath, as to the correctness of the inventory, from the best of their knowledge, information and belief, *and under the advice of counsel that the same was not conclusive upon them.* Smith, the other administrator, swore that he had but little knowledge of the property of the deceased, previous to his appointment as administrator; that all the notes, books, accounts, mortgages and contracts, and evidences of debts, appraised, were in the possession of his co-administrator and administratrix, or one of them, and were presented to the appraisers by them: and that most of the personal property of the deceased, in the county of Chenango, was at the time in the possession of one or both of them. That they had ever since their appointment been acting administrator and administratrix; and that he, Smith, had not been, at any time, sole acting administrator of the estate of the deceased, *according to his best knowledge and belief;* but that he *supposed*, at all times, the *three* were acting *co-jointly*, although particular acts might have been done by one alone; also that he made his affidavit *under the advice of counsel, and claimed that he was not concluded by the same!*

Why did the administrators and administratrix swear in this way? Would they have so shaped their oaths if they

had been guilty of no negligence or misconduct in the management of the estate committed to their charge? It seems to me they would not; and that their oaths to the inventory had a tendency to incite the heirs and next of kin to the deceased into a scrutiny of their accounts and doings with the estate. I think the case shows that they had been remiss in collecting debts due to the deceased; in paying those contracted by him; in converting the personal property into money, and in taking vouchers for moneys paid out by them; also, that they had applied some of the personal estate to uses not authorized by law, and had unnecessarily permitted the same to decrease in their hands; they therefore framed their oaths, as above set forth, preparatory to mystifying the case; and with the hope of escaping individual liability for the injuries they had done, or permitted to be done, to the estate; and I have no doubt but that the long delays and great expenses on their final accounting, were caused by the improper manner in which they had executed the trusts reposed in them; and by the difficulties they encountered in shaping their accounts, and getting up vouchers, to make all their transactions, connected with the estate, appear fair on their face. It was not, therefore, a case in which the surrogate should have allowed the administrators and administratrix any costs whatever, out of the estate, beyond the fees of the auditor and his own fees, incurred by them in making their final accounting and settlement. (*See* 10 *Paige*, 191; 4 *id.* 102; 3 *id.* 88; 10 *Barb.* 432.) And I am of the opinion the contestants were entitled to costs, to be paid out of the estate of the deceased; and that the surrogate should have awarded costs to them. (2 *R. S.* 223, § 10.) It has been correctly held that the decision of the surrogate awarding costs, in a case like this, may be reviewed on appeal. (*Lain* v. *Lain*, 10 *Paige*, 191.)

Was Henry Snow's claim, on the note he held against the deceased, barred by the statute of limitations, so that the surrogate could not decree its payment out of the estate of the

deceased? The date of the note was August 31, 1843; it was signed by the deceased, and bound him to pay Henry Snow $1200 on demand, with interest. It was unpaid when the letters of administration were issued on the estate of the deceased. On the 31st day of August, 1847, one of the administrators paid the interest then due on the note to Snow; and such administrator continued to pay interest on it until the 31st day of August, 1852. The inference is irresistible, that Snow presented the note to the administrators and administratrix within seven years and a half next after its date; and that they allowed it as a valid claim against the estate of the deceased. (6 *Hill*, 389.) The administrators and administratrix not doubting the justice of the claim, and having allowed it, there was nothing in dispute between them and Snow to refer to referees, under the statute. (1 *Denio*, 276.) And for the same reason there was no necessity, or even propriety, for a suit by Snow to establish his claim. He was not bound to exhibit evidences of his claim, or make oath of the justice thereof, because nothing of the kind was required of him. (6 *Hill*, 389. 2 *R. S.* 88, 89, §§ 35 *to* 39.)

Snow's claim having been duly recognized and allowed by the administrators and administratrix, as a valid one against the estate represented by them, within seven years and a half from the time it became due; (*see* 1 *Hill*, 36; 2 *R. S.* 448, § 8; 1 *Denio*, 151;) and their final accounting and settlement having been made within six years of the time that they so recognized and allowed it, the next of kin to the deceased could not require its rejection by the surrogate, upon the final settlement of the estate, on the plea of the statute of limitations. They could not set up such statute against the claim, under such circumstances; and the administrators and administratrix would have been defeated, if they had interposed such statute against the claim.

Snow's claim was not disputed by the administrators and administratrix, before the surrogate; and it was not a disputed claim, within the meaning of the adjudications on the

question. (*See* 13 *Wend.* 35; 6 *Barb.* 352; 10 *id.* 308; 2 *Selden*, 216; 2 *Barb. Ch. R.* 414.) The surrogate could therefore allow it, as a debt against the estate of the deceased, to be paid from assets in the hands of the administrators and administratrix. (2 *Barb. Ch. R.* 414.) But the decree, in regard to this debt, was erroneous, so far as it required Mary Ann Merritt, Bradford Willcox and Charles Willcox, or either of them, to pay any portion of it. (2 *R. S.* 93, § 58. *Id.* 94, § 65. *Id.* 95, § 71. *Laws of* 1849, *p.* 218. 2 *Seld.* 216. 1 *Kernan*, 324. 10 *Barb.* 523. 1 *Hill*, 130. 3 *Barb. S. C. R.* 341. 10 *id.* 309.)

On the subject of the statute of limitations, I will add, that when an executor or administrator presents a claim in his own favor, against the estate he represents, to the surrogate for allowance, legatees or next of kin may set up the statute of limitations against it; (*see* 2 *Bradf.* 116; 1 *Barb. Ch. R.* 455;) and they, as well as heirs and devisees, may interpose such statute as a defense, when sued by creditors of a deceased person, for any portion of his personal or real estate received by them. Where, however, a claim against a deceased person is presented to his executor or administrator, or to the surrogate, for payment out of the personal estate of the deceased, *yet in the hands of the executor or administrator*, nobody but such executor or administrator can dispute such claim, or set up the statute of limitations against it. (2 *R. S.* 88, §§ 35, 36.) But an executor or administrator is personally liable if he allows a claim, against the estate of the decedent, which he knows to be unfounded or unjust; and it is asserted by Dayton that he renders himself personally liable if he omits to set up the statute of limitations, in a case where that defense may be successfully interposed. (*Dayton's Surrogate*, 2*d ed.* 318.) But I will express no opinion as to the correctness of Dayton's view of the question; for none is necessary in this case. (*See, however*, 2 *Kent's Com.* 4*th ed. p.* 418, *note a*; 2 *Com. Dig.* 483; 1 *Atkyns*, 524; *Kirtland's Surrogate*, 186, *and note x, foot of page*

317 *in Dayton's Surrogate, 2d ed.; 5 Pick.* 144; 13 *Mass R.* 201; 16 *id.* 172, 429.)

No sufficient excuse was shown before the auditor or surrogate, why the note Snow held against the deceased was not fully paid by the administrator and administratrix, within eighteen months from the time of their appointment. They had abundant means in their hands for paying it; and they should have been charged personally, by the surrogate, with all interest that accrued on it after the expiration of the eighteen months above mentioned; or with interest from that date on the sum then due on the note. (*Dayton's Surrogate, 2d ed.* 480.)

An executor or administrator who is the general guardian of an infant, cannot, of his own motion, transfer any portion of the personal estate of the deceased, in which his ward has an interest as next of kin or legatee, from himself as executor or administrator, to himself as general guardian of the infant, so as to relieve him from accounting for all of such personal estate, as executor or administrator, before the surrogate. He must keep that portion of the estate, as executor or administrator, which belongs to his ward, until he has authority from the surrogate to hold it as general guardian.

Whenever an executor or administrator's account is finally settled before the surrogate, and any part of the personal estate remains to be distributed, the surrogate shall make a decree for the payment and distribution of what shall so remain, to and among the creditors, legatees, widow and next of kin to the deceased, according to their respective rights. (2 *R. S.* 95, § 71.) And where a distributive share is to be paid to a minor, it cannot be paid to his general guardian for any purpose, without the direction of the surrogate. (2 *R. S.* 98, §§ 80, 82.) Neither can a legacy be paid to the general guardian of a minor, unless by permission of the surrogate. (2 *R. S.* 91, § 47. *Id.* 98, § 82.)

The foregoing conclusions render it clear that Smith's pretended voucher was a nullity, by which he attempted to

relieve himself from accounting for $1000 of the assets of the deceased, *as administrator*, before the surrogate, by crediting himself with that sum, as administrator, and charging himself with the same, *as general guardian* of Mary Ann Merritt, formerly Mary Ann Willcox.

Smith's claim against the estate of the deceased, for an alleged payment of $735.59 to the Bank of Chenango, on the 8th day of July, 1845, and interest thereon, was barred by the statute of limitations; and the surrogate should have disallowed it. The decedent did not die until the 4th day of August, 1845; and over seven years and a half elapsed before this claim was presented by Smith to the surrogate for allowance. It has already been shown that the next of kin to the deceased could set up the statute of limitations against the allowance of such a claim by the surrogate, when presented by an administrator. (*See authorities hereinbefore cited.*) And Smith could not retain assets, in payment of this claim, until it was allowed by the surrogate. (1 *Bradford*, 116. *Laws of* 1837, *ch.* 460, § 37. *See* 18 *Wend.* 319.)

Smith should have been charged, by the surrogate, with his note of $400, dated July 15, 1841, and interest thereon. It was owned by the deceased at the time he died, and it was inventoried as part of his personal estate. The fact that Smith's claim of $735.59, for an alleged payment by him to the Bank of Chenango, was barred by the statute of limitations, does away with the reason assigned by the auditor for not charging him with his note; and no good cause was shown for not charging him with his note and the interest thereon.

The administrators and administratrix had no authority or control over the real estate left by the deceased, except to mortgage, lease or sell it for the payment of his debts, when specially authorized to do so by the surrogate. They were not warranted in paying any taxes on it, which were assessed subsequent to the death of the deceased, or in making payments upon mortgages, on real estate conveyed by him, or

whereof he died seised, which he was under no personal obligation to pay. (*Dayton's Surrogate*, 2*d ed.* 236, 551.) The reason why they could not pay such taxes or mortgages on real estate, with the assets of the deceased, is that the assets were applicable only to the payment of his debts, and such taxes and mortgages were not, in any sense, his debts. They were charges on the real estate, which were for the heirs to pay, to whom such real estate descended.

Whitman Willcox and Elisha B. Smith were appointed the general guardians of four of the infant heirs and next of kin to the deceased, on the 27th day of November, 1845; and they received the rents and profits of their wards' real estate, and also the proceeds of some of their real estate which they sold as special guardians. But they had no right to use moneys, as administrators, which they received as guardians; and the surrogate should not have allowed them for any payments or advances made to the widow or next of kin, out of such moneys. Whatever amounts of such moneys they paid to or for the widow or the next of kin, should have been laid out of view by the surrogate, on their accounting as administrators.

Lucinda Willcox, as widow of the deceased, should have been allowed by the surrogate to retain the personal property of the deceased, specified in the auditor's report, amounting in value to the sum of $342.25. She was entitled to $150 worth of the same under section 2 of chapter 157 of the laws of 1842; (*see* 6 *Hill*, 642; 4 *Selden*, 31; 2 *id.* 597;) and the residue thereof should have been allowed to her, pursuant to the revised statutes. (2 *R. S.* 83, § 9.)

On the 26th day of September, 1853, the surrogate, after hearing all persons interested in the matter, audited and allowed a claim presented by Whitman Willcox against the estate of the deceased, at $1860.79, and authorized him, as administrator, to retain that sum, with interest thereon, out of the assets of the deceased in his hands. It does not appear by the case, upon what evidence this claim was allowed, or

that it was contested on any particular ground; nor does the case show that the statute of limitations was set up against it, either before the surrogate or auditor, although the entire claim accrued upwards of seven years and a half before it was presented to the surrogate for allowance; and no appeal has been taken from the order of the surrogate allowing it. This claim was not credited to Whitman Willcox by the surrogate in the final decree appealed from; and I think it was overlooked by him, through inadvertence; for I am unable to perceive any reason why Whitman Willcox should not have been permitted, by the final decree, to retain this claim, as previously audited and allowed by the surrogate, out of the assets of the deceased in his hands. He must be allowed to retain it, on the rehearing of the case.

Smith had no right, *as administrator*, to purchase the interest which Eli H. Willcox had as next of kin in the personal estate of the deceased, or the interest he had as heir in the real estate left by the deceased, for his co-administrator and the administratrix, or for the heirs and next of kin; and his co-administrator and the administratrix, by the express consent of all the heirs and next of kin and their guardians, had not power to authorize him to purchase, *as administrator*, the interests of Eli H. Willcox in either the real or personal estate of the deceased: neither had the surrogate power to authorize him to do it. Such purchase was not an act which he could do in his representative character.

Smith could have purchased such interests of Eli H. Willcox, for himself individually, or as agent of the widow and such of the heirs and next of kin as were of full age, if he had had authority from them to do so, and had used his or their funds in paying for such interests. I will not say whether he could have purchased such interests of Eli H. Willcox, *as the general guardian* of some of the infants, and had the same sanctioned by the court; for I do not think it necessary to pass upon that question in this case. That question can properly arise only when Mr. Smith shall account as guardian

of Mary Ann Merritt. (*See on this point*, 11 *Barb.* 22; 4 *John. Ch.* 100; 8 *Paige*, 89; 2 *Kent's Com.* 230.)

Whatever assets, belonging to the adult next of kin, were used by Smith with their consent, in purchasing the interests of Eli H. Willcox in the real and personal estate of the deceased, the surrogate could rightfully charge to such adults, to the amount only of their distributive shares in the personal estate of the deceased, over and above the just claims of creditors. Such disposition of assets, belonging to the adults, by Smith, should be regarded as advancements by him to them towards their distributive shares in the personal estate of the deceased. But the surrogate had no right to credit him, on his accounting, for such payments or advancements to the adult next of kin, beyond the amounts of their respective distributive shares in the personal estate of the deceased, for two reasons; 1st. The next of kin, who were infants or who did not consent to such disposition of the assets of the deceased, could not be prejudiced thereby, or have their shares lessened in that manner: 2d. The surrogate's jurisdiction is limited; and he had no authority to decree that either of the next of kin to the deceased should pay back any excess of assets received from Smith, over and above his or her distributive share. (*See* 2 *R. S.* 93, § 58; *Laws of* 1849, *ch.* 160; 2 *R. S.* 94, § 65; *id.* 95, § 71; 2 *Selden*, 216; 1 *Hill*, 130; 3 *Barb.* 341; 10 *id.* 309, 523.) Smith's remedy, if he has any, to recover back any such excess of assets advanced by him to or for the next of kin to the deceased, must be sought in another forum.

If Smith paid for the interests of Eli H. Willcox, in the estate of the deceased, with money or property other than assets of the deceased, that is to say, such as the proceeds of real estate sold or the rents and profits of real estate, he was not entitled to any credit as administrator, or to have any thing deducted from the distributive share of either of the next of kin, or widow, on his final accounting and settlement before the surrogate. His claims for money or property so expended for them, could be enforced only by actions insti-

tuted in this court. The surrogate could not compel the widow or next of kin to the deceased, to pay him for such money or property. It was no part of his duty to adjust equities, between the administrators and next of kin, outside of the management and disposition of the personal estate of the deceased.

What I have said on the subject of the purchase by Smith, of the interests of Eli H. Willcox in the real and personal estate of the deceased, leads me to the conclusion that the surrogate erred in crediting Smith as administrator with $5512.20, as and for money paid by Smith to Eli H. Willcox for his interests in the real and personal estate of the deceased. And I will add that there is no evidence in the case to show that Lucinda Willcox, Mary Ann Merritt and Mrs. Smith were informed, when they said they accepted the conveyance from Eli H. Willcox of his interests in the estate of the deceased, that Smith had paid or was about to pay for such interests with assets of the deceased, in his hands as administrator.

Bradford Willcox was a minor and Whitman Willcox was his general guardian, yet the surrogate has adjudged that he is liable for $1213.42 of assets or moneys received by him from Elisha B. Smith! and also that he has received of the personal property of the estate, by his general guardian, the sum of $1091.89 more than his distributive share; and that he must refund and pay this latter sum, by his general guardian, to Henry Snow, Benjamin F. Rexford, Henry R. Mygatt, Elisha B. Smith, Lucinda P. Smith and Charles Willcox or some of them, as creditors! And the decree makes this sum a charge on the estate of Bradford Willcox. This part of the decree is clearly erroneous, according to the views hereinbefore expressed; and I will add that it seems to me the case does not show sufficient facts to charge Bradford Willcox with any portion of the sum of $1213.42. (*See* 2 *Paige*, 419; 1 *id.* 102; 2 *Kent*, 230; 11 *Barb.* 22; 8 *id.* 48.)

The statute is imperative that every executor or administrator, in rendering his accounts to the surrogate on a final

settlement, "*shall* produce vouchers for all debts and legacies, paid, and for all funeral charges and just and necessary expenses." (1 *R. S.* 92, § 54. *Dayton's Surrogate*, 472, 2*d ed.*) Dayton says, the surrogate may, *in a proper case*, sustain the account of an executor or administrator, on his final settlement, "even without vouchers." (*Id.* 472.) He does not say what kind of a case is a proper one in which the account may be sustained without vouchers; and I think if such an account can be allowed, in any case, without vouchers and without proof other than the oath of the executor or administrator, where separate items of it exceed $20 in amount, it is where creditors refuse to give vouchers; or where the executor or administrator has lost his vouchers, or where they have been stolen or destroyed, and he is unable to procure others. A special act was once passed by the legislature, authorizing the surrogate to allow the accounts of certain administrators without vouchers where they had been destroyed by fire. (*See Laws of* 1847, *ch.* 71.) Perhaps the surrogate should consider such cases as I have mentioned implied exceptions to the statutory rule, on the assumption that the legislature could not have intended to require executors and administrators to perform impossibilities or sustain losses.

The only expenditure which the statute authorizes the surrogate to allow to executors and administrators, for which no voucher is produced, without proof of such expenditures other than their own oaths to their accounts, are items not exceeding twenty dollars each; and they must support such items by a positive oath to the fact of their payment, specifying when and to whom such payment was made; and then such oath must be uncontradicted; and such allowances shall not, in the whole, exceed five hundred dollars, for payments, in behalf of any one estate. (2 *R. S.* 92, § 55. 4 *Paige*, 102. 6 *id.* 166.) Also see case in 2 *Selden*, 216, as to the necessity of the executor or administrator producing negotiable promissory notes to the surrogate.

The fact that a voucher has been procured by the executor

or administrator, a long time subsequent to the transaction to which it relates, is a suspicious circumstance against its accuracy, but that does not justify the surrogate in refusing to receive it as evidence when offered before him. (*Dayton's Surr.* 2*d ed.* 474. *See Tomlin's Law Dict. tit. Voucher, for the meaning of the word.*)

The accounts rendered by executors and administrators should be duly verified by them when presented to the surrogate, especially where the rights of infants are to be affected, although their verification is not required by the parties who appear. (6 *Paige*, 166. 1 *Barb. Ch. R.* 469. *Dayton's Surrogate*, 2*d ed.* 472.)

The above mentioned rules show to what precision executors and administrators are held in rendering, verifying and establishing their accounts on their final settlement before the surrogate; and they are eminently just, and should not be departed from, except in cases of the most urgent necessity, and in order to prevent absolute injustice. The administrators and administratrix should be required to comply with these rules on the rehearing of this case.

Were the administrators and administratrix competent witnesses for each other, on their accounting, before the auditor and the surrogate? It was settled, prior to the year 1857, that the code was not applicable to proceedings by executors and administrators on the settlement of their accounts in surrogates' courts. (*See Woodruff* v. *Cox*, 2 *Bradf.* 223; 16 *Barb.* 200; 3 *Kernan*, 93; 6 *How. Pr. Rep.* 318; *also see remarks and authorities in a former part of this opinion.*) And none of the amendments to the code passed by the legislature of 1857, have changed this rule. The admissibility of the administrators and administratrix as witnesses for each other, must therefore be determined by the law as it exists irrespective of the code. They were at least jointly liable to account for a considerable portion of the assets of the deceased; (*see* 11 *Paige*, 265; *Dayton's Surrogate*, 2*d ed.* 484, 485;) and *prima facie* they were jointly liable for the

entire amount of his personal property, as shown by the inventory of it. They were called to testify, and did testify, directly in favor of their own interests; they were therefore incompetent to be witnesses for each other. (*See* 1 *Barb. Ch. R.* 585; 2 *Paige*, 54; 6 *id.* 585; 1 *Greenl. Ev.* § 361; 2 *R. S.* 92, 93, 94, 95 *and* 98, §§ 54 *to* 59, 65, 71, 80, 82.) The device of having them sworn, nominally for Mrs. Smith, who did not contest their accounts at all, did not authorize their examination, substantially in their own behalf and for each other. They could not testify for each other, for the further reason that they were parties on the record, to the proceedings in which they were examined. (1 *Phil. Ev.* 69. 3 *Comst.* 490, 491.)

It is true, the legislature has declared that executors and administrators "may be examined on oath," touching any payments made by them in their representative characters, and also touching any property or effects of the deceased which have come to their hands, and the disposition thereof. (2 *R. S.* 92, § 54.) This statute was passed when the law was that a party to a suit or proceeding could not even call his adversary as a witness, except in certain cases, by special permission, in the court of chancery; and I think it was intended only to give parties, who contest the accounts of executors and administrators, the right to examine them as witnesses. (*See* 1 *Bradf.* 356.) If more had been intended, it seems to me the legislature would have said that they might be examined on oath, as witnesses in their own behalf. This is the kind of language subsequently employed by the legislature in authorizing parties to suits, provided for by the code, to be witnesses for themselves. (*Code*, § 399.) Besides, executors and administrators were permitted to verify their accounts by affidavit, at the time the statute above mentioned was enacted; and we can hardly presume that the legislature would have interfered in order to authorize them to testify, orally, as witnesses, to sustain their accounts, when swearing to them on paper was allowed. I am therefore of the opinion

that the statute referred to does not secure the right to executors and administrators to be examined as witnesses for themselves, on their final accounting before the surrogate.

But Smith's counsel contended that because Lucinda Willcox as widow, and Whitman Willcox as next of kin, were entitled to certain portions of the assets of the deceased after the payment of his debts, they could be witnesses for each other, and that either could call Smith as a witness. And he also stated that they were competent for each other because, as he alleged, they were not liable for each other's *devastavit*. The first answer which I shall make to this position is, that Lucinda Willcox and Whitman Willcox were before the auditor, as well as the surrogate, as administratrix and administrator, and they there litigated in those characters; the second is, that their interests as administratrix and administrator, in the matters in dispute, greatly exceeded those they had as widow and next of kin. (24 *Wend.* 116. 7 *Hill*, 58. 1 *Greenl. Ev.* § 391.) Another is, that *prima facie*, they were jointly liable for the entire personal estate, as stated in their inventory of it, and clearly so for the greater portion of it until they had testified. The conclusion to which I have come, therefore, is that the administrators and administratrix were not competent witnesses for themselves or for each other, on their final accounting, either before the auditor or the surrogate.

Was Benjamin F. Rexford a competent witness for the administrators and administratrix, or either of them, on their accounting? Their bond as administrator and administratrix was joint, and Rexford signed it as one of their sureties. He gave evidence for them which tended to relieve them from personal liability for a portion of the property of the deceased mentioned in the inventory; and the bond which he executed was conditioned that such administrators and administratrix should faithfully execute the trust reposed in them, as such; and also, that they should obey all orders of the surrogate, touching the administration of the estate committed to them.

(2 *R. S.* 77, § 42.) The decree of the surrogate, making the administrators and administratrix personally liable for a portion of the assets of the deceased, would be evidence against Rexford in an action against him on his bond. (*See Douglass* v. *Howland*, 24 *Wend.* 55; *Rapelye* v. *Prince*, 4 *Hill*, 119; *Cowen & Hill's Notes*, *p.* 984; 1 *Greenl. Ev.* §§ 390, 392, 393, 395, 397.) He therefore had a direct interest in the result of the proceedings before the surrogate, in favor of the administrators and administratrix; and for this reason was an incompetent witness for them or either of them. (1 *Greenl. Ev.* § 386. 2 *Cowen's Tr.* 2*d ed.* 964. 1 *Phil. Ev.* 54. *Woods* v. *Skinner*, 6 *Paige*, 76.)

Executors and administrators, in making up their accounts, are, first, to charge themselves with the amount of the property of the deceased contained in the inventory, at the appraised value. (*Kirtland's Surrogate*, 197 *and* 392.) They are then to make themselves debtor for the increase to the same; such as interest that has accrued on debts owing to the deceased, and property and demands which have been discovered subsequent to the taking of the inventory; next, sums for which they have sold property, exceeding its appraised value; and then all other increase to the inventory, and the items thereof. The whole increase being added to the value of the property, as shown by the inventory, constitutes the debtor side of their accounts. The credit side of their accounts consists, first, of debts marked bad or doubtful, which have not been paid, to them, at the amounts thereof set down in the inventory; secondly, of sums for which they have necessarily sold property at less prices than its appraised value, with a list of the articles so sold; thirdly, the articles of property lost without their fault, and the cause of such loss, with the appraised value of such articles; fourthly, the particular debts, appraised as good, which they have been unable to collect by the exercise of ordinary diligence, and the reasons why they could not collect them, with the amounts of such debts, as noted in the inventory; fifthly,

the debts paid by them, to whom paid and when, and the amounts thereof; sixthly, the items of their actual and necessary expenses paid in the execution of the trusts reposed in them. The sum total of such credits is then to be subtracted from the amount of the debtor side of their accounts. Following the remainder the articles of property yet unsold are to be mentioned, with the appraised value thereof, and also the reasons why they have not sold the same. And afterwards they are to set forth all other facts which are pertinent and proper to be considered by the surrogate in making up his decree. It is not absolutely necessary that the accounts of executors and administrators should in all cases be made out in the manner above stated, but such method ought to be substantially adopted.

In this case the amount at which the inventory footed, or that it was footed at all, is not mentioned by either administrator or the administratrix, by the auditor or the surrogate. In one of the petitions of appeal the amount is stated to be $42,189.68; but I have not added the figures together to see if that is the true sum.

Many errors were committed by the auditor and surrogate, which I have not mentioned; and I do not deem it necessary to notice them, for the reason that the entire decree must be reversed, and the whole case must be reheard before the surrogate, without regard to the auditor's report, or any decision made by the surrogate on the hearing heretofore had before him. (*See* 1 *Barb. Ch. Pr.* 404, 431; 1 *Bradf.* 133; 2 *id.* 1.) And according to the views hereinbefore expressed, the costs of Mary Ann Merritt, Bradford Willcox and Charles Willcox in the surrogate's court, as well as their costs on the appeals to this court, and also the fees of the auditor and surrogate, should be charged upon and be paid out of the estate of the deceased in the hands of the administrators and administratrix; and the costs of the administrators and administratrix in the surrogate's court, (except the fees of the auditor and surrogate,) as well as their costs on the appeals to this court,

should be borne by them personally. (2 *R. S.* 618, § 25.) And Rexford, Mygatt and Snow should pay their own costs on the appeals.

GRAY, J., concurred in the reversal, upon the ground that the administrators and administratrix and Rexford were erroneously allowed to testify; and upon the ground that Smith's receipt as guardian, to himself as administrator, was improperly received in evidence. He did not express an opinion upon any other point.

MASON, J. The auditor committed an error in allowing these administrators to be sworn in behalf of each other. They were not competent witnesses for each other under the common law rules of evidence, or the statutes relative to proceedings before surrogates. And our code of procedure in civil actions has no application to proceedings in surrogates' courts; (*Woodruff* v. *Cox*, 2 *Bradford*, 223; *Sherman* v. *Youngs*, 6 *How. Pr. R.* 318; *Burritt* v. *Silliman*, 16 *Barb.* 198, 201;) and the surrogate erred in basing his decree upon this evidence.

They are not competent witnesses on this final accounting before the surrogate, at common law. (*Pack* v. *The Mayor &c. of New York*, 3 *Comst.* 489. 1 *Phil. Ev.* 69.) Being a party to the record was enough to exclude them, at common law, either in behalf of themselves or their co-administrators, although they had no interest in the suit. (4 *Comst.* 489.) In actions at law administrators are incompetent witnesses for each other. (1 *Greenl. Ev.* 371. *Fort* v. *Gooding*, 9 *Barb.* 371. *Woods* v. *Skinner*, 6 *Paige*, 76. *Rogers* v. *Dibble*, 3 *id.* 238. *Dean* v. *Thornton*, 3 *Kernan*, 266.) They were incompetent witnesses, in equity. They all gave a joint bond with sureties. They all united in returning an inventory, and all have power over the personal estate. They are all parties to these proceedings before the surrogate on the final accounting, and are all attempting to promote their own interests by accounting for the property so as to avoid liability. They are

all equally, *prima facie*, liable to creditors and the next of kin for the property mentioned in the inventory. (2 *Kent's Com.* 507, 8, 4*th ed.*; 3*d ed.* 414, 15. 1 *Bradf. Surr.* 321, 333. 2 *id.* 220, 221. *Wright's Ex'r's Guide*, 92, 104, 114. 2 *R. S.* 146–149, 3*d ed.*) And if we strike out the evidence of these administrators themselves there is nothing in the case showing any thing but the ordinary case of joint liability on these administrators, for all the assets embraced in the inventory; and the rule is well settled that when an objection is made to the competency of a witness, upon testimony already given, and he is sworn and examined under the objection, the court cannot take his evidence into account in determining the question of his competency. (*Mott* v. *Hicks*, 1 *Cowen*, 513.) They are not competent witnesses in equity. (*Clark* v. *Clark*, 8 *Paige*, 153, 159. *Johnson* v. *Corbett*, 11 *id.* 277. *Eckford* v. *DeKay*, 6 *id.* 565. 2 *id.* 54, 60. 1 *Barb. Ch. R.* 585. 1 *Greenl. Ev.* § 361. 3 *id.* § 314. 2 *Cowen & Hill's Notes*, 1550.)

The statute in regard to proceedings before surrogates on the final accounting makes no provision for the examination of the administrator, either in his own behalf or on behalf of his co-administrator; except that the 55th section 2 *R. S.* 92, allows the administrator to support by his own oath any item of expenditure not exceeding $20, by his swearing positively to the fact of payment, specifying when and to whom such payment was made; but it expressly provides that such allowances shall not in the whole exceed $500, for payments in behalf of any one estate. The 54th section, 2 *R. S.* 92, does not authorize the examination of an administrator, either on his own behalf or in behalf of his co-administrator. That section only contemplates an examination at the instance of the adverse party, and no other construction has ever been put upon it. The 55th section shows that the legislature must have intended this, as it forbids the establishment of payments of over $20 in any one item, and in the aggregate not exceeding $500; and by necessary implication, therefore, forbids the

idea that he can give evidence generally in regard to payments and as to the effects of the deceased which have come into his hands, and the disposition thereof. It is no answer to this objection that Whitman Willcox, one of the administrators, was called for Mrs. E. B. Smith, one of the heirs, for Mrs. Smith had not filed any objections to the account; and besides, her husband was one of the administrators whose accounts were being contested; and as Whitman Willcox, jun. died in 1845, prior to any of our enabling statutes in behalf of married women, her husband was entitled to take whatever of personal property might come to his wife from that estate. It was legally his and not his wife's. It is entirely manifest that Whitman Willcox was examined in behalf and for the benefit of the administrators, and not the contestants. The contestants object to his being sworn, and the whole course of his examination shows that it is the merest pretense in the world to allege that he was called for Mrs. Smith as heir. He was called by Mr. Rexford, who appeared for both Smith and his wife—nominally for Mrs. Smith, but in reality for E. B. Smith, one of the administrators. And an equally palpable error was committed in allowing E. B. Smith to be examined as a witness in behalf of his co-administrator, Mrs. Willcox, and Whitman. And a more flagrant error was committed in allowing Mrs. Willcox, the administratrix, to be examined as a witness in her own behalf and for Whitman, her co-administrator.

But it appears from the case that each of these administrators was not only allowed to give evidence for the other, but they were fully examined, not by the contestants, but by their own counsel and in their own behalf, and their evidence, it seems from the case, must have had great control both with the auditor and surrogate upon the accounting.

There was an error committed in allowing B. F. Rexford to be sworn and examined as a witness in behalf of E. B. Smith, one of the administrators. He is one of the sureties to the administrators' bond, and was interested to reduce the amount which might be decreed against the administrators on

the final accounting, as it would thereby diminish his own liability. That the surety in such a case is an incompetent witness in behalf of the administrator is a proposition too plain to be discussed. It is a stubborn and inflexible rule that if a witness has a direct interest, however small, in the event of the cause, he cannot be admitted to testify upon the trial, in favor of that interest, in any respect or degree. (*Butler* v. *Warren*, 11 *John.* 57. *Hubbly* v. *Brown*, 16 *id.* 70. *id.* 195. *Smith* v. *Bradstreet*, 5 *Cowen*, 214, 215.) The decree of the surrogate on the final accounting of the administrators is conclusive evidence against the sureties, in an action on the administrator's bond. (2 *R. S.* 53, 116, § 19. 12 *Wend.* 492. 3 *McCord*, 225, 412. *Lucas* v. *Guy*, 2 *Bailey*, 403. *The Ordinary* v. *Coudry*, 2 *Hill's S. C. R.* 313. *Head* v. *Giles*, 12 *Pick.* 53. *The People* v. *Dunlap*, 13 *John.* 437.) And we so held in *The People, ex rel. Trowbridge*, v. *Judah Pierce and others*, (*in MS.*)

The following cases are referred to as authorities holding the sureties to this bond to be incompetent witnesses for the administrators on this final accounting. (*Niles* v. *Brockett*, 15 *Mass. R.* 378. 3 *J. J. Marsh.* 461. 1 *Cow. & Hill's Notes*, *p.* 109, *n.* 101. 7 *Martin's Lou. Rep.* 373. *Wood* v. *Skinner*, 6 *Paige*, 76. *Scott* v. *Young*, 4 *id.* 542. 5 *Watts*, 225, 228, 229. 1 *Phil. Ev.* 49. 5 *Serg. & Rawle*, 371. 5 *T. R.* 578. 5 *Cowen*, 215. 4 *John.* 293. 11 *id.* 57. 16 *id.* 92. 4 *Mass. R.* 653. 2 *Day*, 99. 9 *Cowen*, 128.)

There was another error committed, both by the auditor and the surrogate, in allowing the receipt of Elisha B. Smith as guardian of Mary Ann Merritt, given to himself as administrator, for one thousand dollars paid by himself as administrator, to himself as guardian of Mrs. Merritt. Such receipt furnishes no evidence for himself as administrator. He could not make any contract as her guardian, with himself as administrator, which can be binding on her. Neither can he, with one hand as her guardian, draw a receipt to himself as administrator, and pass it over into his other hand as administrator,

and claim it as evidence against his ward, of the payment of $1000, or as evidence of payment in his own behalf as administrator. The law will not permit him to act in such a double capacity. The great danger of imposition, in such cases, has induced courts of equity to indulge in the presumption of fraud, against such acts, although the fraud may be inaccessible to the eye of the court. (9 *Paige*, 242. 4 *Kent*, 3*d ed.* 438. *Parsons on Cont.* 74, 5.) He cannot bind Mrs. Merritt, his ward, when he acts thus in a double capacity. She is entitled to have her guardian free from such temptations, when he assumes to deal with her interests and bind her. The case in principle is analogous to that of an agent, who assumes to act for both parties in making a contract or transacting business; (*Parsons on Cont.* 74, 5; *Story on Agency*, §§ 9, 192, 211, 214, 210; *Dunlap's Paley on Agency*, §§ 33, 4;) in which case the law adjudges the contract or transaction presumptively fraudulent. This principle is applicable to all persons placed in situations of trust or confidence, and embraces trustees, executors, administrators guardians, agents, &c., &c. It embraces all who come within the principle. (9 *Paige*, 241, 242. 5 *Vesey*, 678. 1 *id.* 287. 2 *id.* 317. 1 *Russell & Myl.* 58. 2 *Myl. & K.* 819. 1 *Mason*, 341. 6 *Pick.* 196. 2 *John. Ch.* 252. 5 *id.* 38. *Hopk. Ch.* 515. 9 *Paige*, 237. 4 *Cowen*, 103. 8 *id.* 502. 9 *id.* 234. 12 *id.* 355. 1 *Bro. C. C.* 119. 5 *Paige*, 650. 2 *Myl. & Cr.* 574. 4 *id.* 134. 6 *Ves.* 625. 1 *Story's Eq. Jur.* § 315, 316. 2 *Mason*, 369. 1 *Jac. & Walker*, 294. 1 *John. Ch.* 27. 2 *id.* 394. 3 *Ves.* 740. 4 *Denio*, 575. *Angell on Fire and Life Ins.* 454, 455. *Parsons on Cont.* 74, 75.)

This receipt then was not a legal voucher for Mr. Smith, for the payment of this $1000, and the charge is not helped by his *ex parte* affidavit, annexed to his account. This affidavit and receipt are the only evidence introduced to sustain this claim of $1000; and both the surrogate and auditor committed an error in allowing it to be proved by such evidence.

This receipt is but an admission of the person making it,

and he cannot, as we have seen, make an admission for Mrs. Merritt, as guardian, in his own favor as administrator, to relieve himself from $1000, and charge it to her. Such a doctrine would subvert the rules of evidence, and make his own receipt in fact evidence in his own favor.

It is very questionable also whether Mr. Smith, as guardian, had any authority to pay over the capital of his ward's funds without the order of the court. In allowing the maintenance of the infant, the court usually confines itself within the limits of the income of the property, and certainly without the express sanction of the court, a guardian will not be permitted, of his own accord, to break in upon the capital. (*Dayton's Surrogate*, 634, 2*d ed.* 2 *Story's Eq. Jur.* § 1355. 1 *Myl. & K.* 627. *Stephens* v. *James, Jacob's Rep.* 193. *Loyal* v. *Farlie, id.* 265.) And I am inclined to think that the surrogate acted without jurisdiction in making that part of his decree wherein he directs that Mrs Merritt pay the amount found due from her to the persons named therein, and if not paid that it be a lien on her share of the Eli H. Willcox property. (2 *R. S.* 93, §§ 61 *to* 63. 2 *Selden*, 221.) Surrogates' courts are courts of special and limited jurisdiction. (3 *Barb.* 341. 1 *Hill*, 130. 10 *Barb.* 309, 523.) The extent of the surrogate's decree is limited by the statute to the particulars enumerated in section 65, 2 revised statutes, 93. (3 *Barb.* 341. 10 *id.* 309.)

The auditor allowed the certificates of third persons to be received in evidence to prove facts directly tending to vary and reduce the inventory. These certificates were introduced as vouchers. Now vouchers on the final accounting are made evidence for the admistrators only to show payments of debts and legacies, and of funeral charges, and just and necessary expenses. (2 *R. S.* 92, § 54.) These vouchers derive their entire competency and force, as evidence for the administrators, from the statute which allows them as evidence to prove the facts stated in the statute. These certificates were allowed for the purpose of showing the decrease of the estate; that

debts inventoried as due the estate were not due, or only partly due; that they had been reduced by payments made to Whitman Willcox, jun., in his lifetime. They cannot be received as evidence to prove such facts. They are vouchers in the administrators' hands only of the payments made by them, and are then limited to the class of facts specified in the statute, to wit: payment of debts, legacies, funeral charges, and just and necessary expenses. (2 *R. S.* 92, § 54.) These certificates are not made evidence by being accompanied, some of them, by the affidavits of the persons giving the certificates; for the affidavits are extra judicial, and are not evidence. (2 *Cow. & Hill's Notes, p.* 944, *note* 689.) It is very clear to my mind, that these certificates and extra judicial affidavits of the persons making them, are not evidence to decrease the estate, or reduce the assets as fixed by the inventory and affirmed by the oaths of the appraisers and administrators. The inventory is made by sworn appraisers, in pursuance of the statute, and the administrators take and subscribe an oath to be attached thereto, to the effect that it contains a full statement of all the personal property of the deceased which has come to their knowledge, and that it is in all respects just and true, &c., (2 *R. S.* 85, § 16,) and the inventory must contain a statement of the securities belonging to the estate, and the amount collectable on each security. (2 *R. S.* 84, § 11.) The general rule undoubtedly is that the administrators are prima facie accountable for the whole amount of the inventory at its appraised value. (*Dayton's Surrogate*, 248, 267, 268 *and* 269. 2 *Kent's Com.* 515, 516, 8*th ed.*; 415, 3*d ed.* 2 *Bradf. Sur. R.* 221. *Wright's Executor's Guide*, 92, 104, 114. 2 *R. S.* 82, §§ 4, 5, 6, 11. 3 *id.* 640, § 10, *note.*) And the debts inventoried and not designated as desperate must be accounted for as assets in the hands of the administrators, or good cause shown for not collecting them. (*Wright's Ex. Guide*, 92, 104, 114. 2 *Bradf. Surr.* 220. 11 *Wend.* 361.)

I concur with my brother Balcom in opinion, that the item of $5512.20, charged in Mrs. Smith's account for moneys paid

Eli H. Willcox, were improperly allowed by the auditor and surrogate, for the reasons stated in the opinion of Justice Balcom, and for the additional reason that testimony was improperly allowed to prove this item, and it is not proved by other evidence.

The statute of limitations furnishes a complete bar to Mr. Smith's claim for the two notes of $735.59 and $800, paid by him at the Chenango Bank, July 8, 1845, and in October, 1845; (*Treat* v. *Fortune*, 2 *Bradf.* 116;) and besides, the inventory furnishes presumptive evidence, at least, that this claim, if it ever existed, had been extinguished. And in addition to this, the confession of the judgment by Smith on 17th May, 1847, for $3000, in favor of this estate, is *prima facie* evidence to rebut the existence of any such claim. And indeed it is a most solemn admission of an actual indebtedness, on his part, to this estate, of that amount, if it is not conclusive upon him. (5 *Denio*, 304. 2 *Selden*, 461.) And if we strike out the evidence of Mr. Smith and Rexford, as we have seen that we are obliged to do, there is no evidence in the case to overcome the effect which the law attaches, in its presumptions, to that judgment.

Decision. Decree of the surrogate *reversed;* and the whole case referred back to be reheard before the county judge of Chenango county, acting as surrogate; and ordered that the costs of Mary Ann Merritt, Bradford Willcox and Charles Willcox in the surrogate's court, as well as their costs on the appeals to this court, and also the fees of the auditor, be charged upon and paid out of the estate of Whitman Willcox deceased, in the hands of the administrators and administratrix; and that the costs of the administrators and administratrix in the surrogate's court (except the fees of the auditor and surrogate) as well as their costs on the appeals to this court, be borne by them personally; and that Rexford, Mygatt and Snow pay their own costs on the appeals to this court.

[Broome General Term, January 5, 1858. *Gray*, *Mason* and *Balcom*, Justices.]

26 356
124a 356

26 356
63h 342

26 356
29 295
27h 573
79a 143
81a 116

DANIEL T. WOOD *vs.* MERCY J. WOOD and others.

Where land is devised to the children and heirs at law of the testator, after the payment of debts, if it does not appear that the devisees have taken possession of the real estate, or have accepted the devise to them, or promised to pay, or have paid, any portion of a debt owing by the testator, or sold the land or any part of it, as heirs at law of the testator, they are not personally liable to pay the debt.

In an action brought by a creditor, against heirs and devisees, for the recovery of a debt owing by the testator, a judgment may be entered that the plaintiff's debt be levied and made of the lands and tenements of the testator described in the complaint, notwithstanding the demand in the complaint is for a judgment against the defendants personally.

An action brought to reach real estate which a testator devised to the defendants, and to have the same sold, for the purpose of satisfying a debt which the testator owed to the plaintiff, is an action *in rem*, for equitable relief, of which the supreme court had not jurisdiction previous to the code; and may therefore be commenced at any time within ten years after the cause of action accrued.

The provisions of the code, relative to the time for commencing actions, do not apply to cases where the right of action accrued prior to the time the code took effect.

Where, upon the dissolution of a partnership between the plaintiff and W., it was agreed between them that the plaintiff should proceed to collect the debts due to the firm, and apply the same to the payment of the debts for which each partner was solely liable, and also all debts owing by the firm; and if there should be a deficiency of debts due to the firm to pay the debts owing by them, each partner should pay one half of the deficiency, and if there should remain a surplus after making such payments, that the same should be divided between them; *Held* that the plaintiff was entitled to a reasonable time in which to collect and pay the debts; that two years and thirty-eight days was not an unreasonable time for that purpose; and that until after the expiration of such reasonable time, the one half of a deficiency owing to the plaintiff from W., under the contract, did not become due, and therefore the statute of limitations did not commence running.

Where, by the terms of a will, the testator gives to his children all the rest and residue of his real and personal property "*after the payment of his debts*," the debts are impliedly charged upon the estate devised; and in case of a deficiency of personal estate, there is a manifest equity in applying the real estate to the payment of debts. And it will be so applied, in an action for that purpose, brought by a creditor, against the devisees. GRAY, J., dissented.

APPEAL from a judgment entered at a special term, upon the report of a referee. The plaintiff and Jacob Wood

were partners in business, at Ithaca. By an agreement, dated April 10, 1840, the partnership was dissolved. That agreement, after providing that Jacob Wood was to have certain promissory notes and claims, amounting in all to $1613, and the bark mill, leather, and tools at the tan-yard, horses and neat stock, wagons, harness and farming utensils, and pew in church, it further provided, that the goods in store should be divided equally between the parties. It next recited that D. T. Wood was liable, individually, for debts of the firm, to the amount of rising of $1000, and Jacob Wood in like manner to rising of $1000. It then provided that D. T. Wood should at the proper costs and charges of the parties, take charge of and collect all the debts due to the said parties, and apply the same to the payment of the aforesaid indebtedness, and all other debts of the firm. In case of a deficiency of debts due the firm, to pay the debts of the firm, each party was to pay half the deficiency, and if any surplus, the same to be divided. The amount of debts of the firm appeared, upon evidence furnished by the plaintiff's books of account, to have been $5378.88, and the amount of debts due to the firm $1630. All the debts of the firm were paid *prior* to the 15th of June, 1842. The plaintiff then knew that a portion of the assets, on hand, were bad and uncollectible. Jacob Wood died May 18, 1842, leaving a last will, which was admitted to probate, and letters of administration with the will annexed issued on the 23d of May, 1842. On the 11th February, 1851, the administrators were, on application of creditors, ordered to render an account. A final account was rendered on the 12th September, 1851, and by the surrogate's decree it appeared there was a deficiency of assets to pay the debts of said Jacob Wood, and that there was in the hands of the administrator, to be distributed, $1067.53, of which $235.80 was ordered to be paid to the plaintiff as his distributive share thereof. Besides the said $235.80, the administrators had, from time to time, paid the plaintiff, as appeared by the referee's report, in all $549.05. The will bequeathed a *specific legacy, a note for* $1000, to

James Munger; devised certain real estate to Sylvester Munger and his heirs; and to these defendants, "after the payment of his debts," all the rest of his real and personal property. The plaintiff alleged a large balance due him from the estate of Jacob Wood, and sued the defendants as devisees, demanding judgment against them for the amount, with interest and costs. The cause was tried at a special term, upon a report of facts by the referee, and judgment was given for the defendants. On appeal to the general term, judgment was reversed, and the referee was directed to state an account. Upon a second trial at special term, judgment was ordered for the plaintiff, and was entered for the amount reported by the referee. The defendants appealed from the judgment.

H. A Dowe, for the appellants.

A. Wells, for the respondent.

Balcom, J. The plaintiff brought this action as a creditor of Jacob Wood deceased, who died on the 18th day of May, 1842, leaving a last will and testament, by which the real estate, described in the complaint, was devised to the defendants in fee, as tenants in common. The defendants are the children and only heirs at law of Jacob Wood deceased. They would own the land described in the complaint in fee, as his heirs at law, if Wood had died intestate; and they can claim title to it in fee as devisees under his will.

The complaint seems to have been framed under the belief that the plaintiff was entitled to have his debt against Jacob Wood deceased satisfied out of the real estate therein described, to which the defendants have title in fee as tenants in common, whether they should claim the same as devisees of the deceased or as his only heirs at law; and it is probable that the pleader supposed the defendants might be made personally liable for the alleged debt by the judgment in the action. But whatever notions the pleader may have entertained when he

drafted the complaint, I think it is sufficient, or may be made sufficient by amendment without doing injustice to the defendants, to entitle the plaintiff to recover in the action, if the conceded facts and evidence show that he has a cause of action against the defendants, whether it be legal or equitable.

Errors in pleadings must now be fatal to the action or defense, or they will be disregarded or cured by amendments in furtherance of justice, both before and after judgment. (*Code*, §§ 169, 173, 176.) A plaintiff who expects to recover in an action, when there is a substantial defense to it, solely by reason of defects in the answer, or a defendant who thinks of succeeding in an action upon errors in the complaint, without regard to the merits of his defense, may as well stay out of court as to come in, under the code. (1 *Kernan*, 368; 3 *id.* 127, 322. 12 *How. Pr. Rep.* 322, 293; 11 *id.* 168.) The language of section 176 of that act is imperative, that "the court shall, *in every stage of an action*, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." And when the courts construe the allegations of pleadings *liberally*, (as section 159 of the code enjoins,) with a view to substantial justice, parties who are in the right on the merits of cases, will succeed; and the efforts of lawyers over technicalities in pleadings will lose all their charms. (*See* 2 *Kern.* 433.) But I have said enough on this question, and will now proceed to the consideration of other branches of the case.

It does not appear by the pleadings or proofs that the defendants have taken possession of the real estate described in the complaint, or have accepted the devise to them of the same by Jacob Wood deceased; or have promised to pay, or have paid, any portion of the plaintiff's debt against the deceased; nor have they sold such real estate, or any part of it, as heirs at law of the deceased; therefore they are not personally liable to pay the plaintiff's debt. (2 *R. S.* 454, §§ 47, 49, 51; *id.* 456, § 60. *Schermerhorn* v. *Barhydt*, 9 *Paige*,

28. *Kelsey* v. *Western*, 2 *Comst.* 500. *Tole* v. *Hardy*, 6 *Cowen*, 333. *Dodge* v. *Manning*, 11 *Paige*, 334; *S. C.* 1 *Comstock*, 298. *Elwood* v. *Deifendorf*, 5 *Barb.* 398.) It is true that the plaintiff's demand of judgment in the complaint is against the defendants personally; but that may be disregarded, or changed, or regarded as changed, in furtherance of justice: and I am of the opinion it should not affect the plaintiff's rights in the action, because the judgment is, that his debt be levied and made of the lands and tenements of Jacob Wood deceased, described in the complaint, and no other. (2 *R. S.* 454, § 47; *Id.* 456, § 60.) Section 275 of the code, and the decision of the court of appeals in *Marquat* v. *Marquat*, (2 *Kern.* 336,) show that such a judgment may be given, notwithstanding the demand of judgment in the complaint is personal against the defendants. If there be an answer, the court may grant the plaintiff "any relief consistent with the case made by the complaint and embraced within the issue." (*Code*, § 275.)

No execution can be issued upon the judgment except such as shall require the sheriff to satisfy the same out of the property of the deceased, described in the complaint. (*Code*, § 289, *subd.* 2. 2 *R. S.* 363, § 3; 367, § 25.) Therefore no wrong can be done to the defendants in enforcing the judgment: and inasmuch as their substantial rights have not been affected by reason of the form of the judgment entered against them being different from the one demanded in the complaint, they cannot have a new trial on this branch of the case.

The basis of the action is the debt which Jacob Wood deceased owed the plaintiff; but that is not the gist of it. It is not an action for the recovery of money only, although the ultimate object of it is to obtain money; nor is it one for the recovery of specific real property, for the plaintiffs cannot have the land described in the complaint as the fruits of the litigation; but it is an equitable action to reach certain real estate, which Jacob Wood deceased devised to the defendants, and to authorize its sale for the purpose of satisfying a debt that

the deceased owed the plaintiff. It is strictly an action *in rem*, for no facts are set out in the complaint, and none were established on the trial, to support a claim against the defendants personally. It was not a case for a jury, but the issues in it were triable by the court. (*Code*, §§ 253, 254. *Draper* v. *Day*, 11 *How. Pr. Rep.* 439.) In other words, it is an action for equitable relief, of which the supreme court had not jurisdiction prior to the enactment of the code. (*Elwood* v. *Deifendorf*, 5 *Barb.* 398, 411. 3 *Cowen*, 133. 6 *id.* 333. 7 *John. Ch.* 116. 9 *Paige*, 28.) It could therefore be commenced at any time within ten years after the cause of action accrued, either by the revised statutes or under the code. (*Code*, § 97. 2 *R. S.* 301, § 52. 2 *Denio*, 586.) The code took effect on the 1st day of July, 1848; (*Laws of* 1848, *p.* 565, § 391;) and the plaintiff's cause of action accrued against the defendants before that time. The times prescribed by the code, in which actions must be commenced, do not apply to cases where the right of action accrued prior to the time it became in force. (*Code*, § 73. 2 *Kernan*, 635.) The limitations contained in the revised statutes, therefore, apply to this case; but so far as they affect actions like this, they are similar to those in the code. The code does not affect proceedings by creditors of deceased persons to collect their debts out of real estate devised or descended, "except that when in consequence of any such proceeding a civil action shall be brought, such action shall be conducted in conformity to *that* act;" and except also, that where any particular provision touching such proceedings shall be inconsistent with that act, such provision shall be deemed repealed. (*Code*, § 471.)

If section 73 of chapter 460 of the laws of 1837 applies to suits against devisees as well as heirs, it does not give creditors the right to bring either legal or equitable actions as their fancies may suggest. It has already been shown that devisees may make themselves personally liable to pay the debts of their testator by accepting the devises and promising to pay the debts, and in other ways; and heirs may also make them-

selves personally liable for the debts of their intestate. And when they become personally liable to pay such debts, purely legal actions may be sustained against them, to recover the same. (3 *Cowen*, 133, 612. 6 *id.* 333. 5 *Barb.* 398. 1 *Comst.* 298. 6 *Hill*, 350. 2 *R. S.* 454, § 49.) Hence all that section 73 of the act of 1837 before mentioned, does, is to compel creditors to sue heirs and also devisees, (if it applies to the latter,) *jointly* when they are liable at law, and also *jointly* when they are only liable in equity. (*See also* 2 *R. S.* 456, § 60.)

At what time did the plaintiff's cause of action accrue? The contract, on which the plaintiff founds his claim against the estate of Jacob Wood deceased, bears date the 10th day of April, 1840. The plaintiff and the deceased were partners up to that date. They then had goods on hand, and debts were due them, as partners. The contract dissolved their firm; and it provided for a division of their goods between them. And it showed that the plaintiff was solely responsible for debts which the firm ought to pay, amounting to upwards of $4000; and that the deceased was solely responsible for debts, on account of the partnership, to an amount exceeding $1000. It was therefore stipulated in the contract, that the plaintiff should, at the proper costs and charges of the parties, take charge of and proceed to collect all the debts due to the firm, and apply the same to the payment of the debts for which each partner was solely liable on account of the firm as above mentioned, and also all debts owing by the firm; and if there should then be a deficiency of debts due to the firm, to pay the debts owing by the firm, and what each partner was solely liable to pay, each partner agreed to pay one half of the deficiency; and if there should remain a surplus after all such payments, then they were to divide such surplus between them.

The plaintiff went on, under this contract, collecting the debts due the firm and paying debts owing by the firm, until March 15, 1852, when he wound up the business, and

ascertained that the firm was owing him a balance; one half of which is the claim against the estate of the deceased on which this action is predicated.

The plaintiff was entitled to a reasonable time to collect the debts due to the firm and pay the debts specified in the contract above mentioned, before the deceased could require him to account; and the plaintiff was bound to perform the contract, so far as it could be performed by him, before calling on the deceased for one half of any deficiency which the firm was owing him. Such deficiency could only be ascertained after the plaintiff had collected the good debts due to the firm; and the plaintiff being entitled to a reasonable time in which to make such collections, the half of the deficiency that the deceased owed him, did not become due until the expiration of such reasonable time. And I am of the opinion that the time between the date of the contract and the death of Jacob Wood, which happened on the 18th day of May, 1842, was not an unreasonable period to allow the plaintiff for collecting the debts due to the firm; and that consequently the plaintiff's cause of action against the deceased for half of the sum in which the firm was indebted to him, did not accrue until the time Jacob Wood died. This gave the plaintiff only two years and thirty-eight days in which to wind up the affairs of a firm whose dealings were quite extended in the credit line; and I think this is a shorter period than it usually takes partners, or their receivers, to close the business that pertains to such firms.

The will of Jacob Wood, deceased, was proved May 23, 1842, and letters of administration on his estate, with his will annexed, were granted on that day to Edward L. Porter and two others as administrators. The plaintiff was prohibited by statute from bringing any suit against the defendants as devisees named in the will of the deceased, in order to charge them with the debt that the deceased owed him, for three years from the time of granting letters of administra-

tion to Porter and others. (2 *R. S.* 109, § 53. 5 *Paige*, 254. 9 *id.* 90.) This period must be deducted from the time the plaintiff had, in which to bring suit, after his cause of action accrued. (*Vanwezel* v. *Wyckoff*, 3 *Sand. Ch. R.* 528.) The statute did not run against the plaintiff during these three years: therefore his cause of action against the defendants did not accrue until the 24th day of May, 1845; and this action was commenced on the 16th day of April, 1853, which date was within the ten years next after the time the plaintiff first had the right to sue the defendants. The statute of limitations, therefore, was no defense to the action.

The complaint specified with reasonable certainty the real estate devised to the defendants; and this is a sufficient description of it according to section 44 of the statute on the subject, (2 *R. S.*, *p.* 454,) which section is made applicable to actions against devisees, by section 60 of the same statutes. (2 *R. S.* 456.) Sections 32, 56 and 59 of those statutes, are as follows, to wit:

§ 32. "The heirs of every person who shall have died intestate, and the heirs and devisees of any person who shall have died after the making of his last will and testament, shall respectively be liable for the debts of such person, arising by simple contract or by specialty, *to the extent of the estate, interest and right*, in the real estate which shall have descended to them, from, or been devised to them by, such person." (2 *R. S.* 452.)

§ 56. "Devisees made liable by the foregoing provisions, to the creditors of their testator, shall not be so liable, unless it shall appear that his personal assets, and the real estate of the testator descended to his heirs, were insufficient to discharge such debt; or unless it shall appear that after due proceedings before the proper surrogate, and at law, the creditor has been unable to recover such debt, or some part thereof, from the personal representatives of the testator, or from his next of kin, or legatees, or from his heirs." (2 *R. S.* 455.)

§ 59. "It shall be incumbent on the creditor seeking to charge any devisees, to show, on the trial, the facts and circumstances herein required to render them liable." (2 *R. S.* 456.)

If sections 33 and 36 of of the same statutes are made applicable, by the sixtieth section thereof, to actions against devisees, as I think they are, it is unnecessary to quote them herein, for they are substantially like sections 56 and 59 above set forth.

The testator had no real estate that descended to his heirs. He devised all he possessed. The plaintiff clearly established, on the trial, that the testator's personal assets were insufficient to discharge the debt on which this action is based; and that they were exhausted in paying the testator's debts, by due proceedings before the surrogate of Tompkins county, and that the plaintiff's debt was left unpaid. The plaintiff could not have sustained any action at law against the legatee named in the will, for the reason that such legatee did not receive the note bequeathed to him by the testator. The presumption is, from the facts proved, that the administrators kept the note and collected it, if it was collectible, and paid the avails of it to the creditors of the testator.

None of the testator's next of kin or heirs received any personal property which he owned at the time of his death. The administrators did not dispute the plaintiff's claim against the deceased, but paid as much of it as they could with the assets they received; therefore there was no chance for the plaintiff to prosecute them, and no remedy was left to the plaintiff to collect his debt out of the estate of the testator, except to institute this action. And I am of the opinion his proof on the trial fully came up to the requirements of the statutes above mentioned, and that he was entitled to the judgment which he recovered.

The defendants did not set up in their answer, or offer to prove on the trial, that the testator owed any other debts than

the one to the plaintiff, as they might have done; (*see* 2 *R. S.* 453, § 39;) and it could not be presumed that he owed other debts, which remained unsatisfied. If there was any defect of parties to the action the defendants waived the same by not taking an objection and pointing out the defect, either by demurrer or answer. (*Code* § 144, § 147, § 148. 2 *Kernan*, 584. 3 *id.* 336. *Churchill* v. *Trapp*, 3 *Abbott*, 306.)

There is palpable equity in applying the real estate described in the complaint to the payment of the plaintiff's debt, for the reason that by the terms of the will of the deceased, the debt is impliedly charged upon such real estate. The defendants were to have such real estate *after the payment of the testator's debts.* (*See Lupton* v. *Lupton*, 2 *John. Ch. R.* 614; 7 *id.* 116; 1 *Comst.* 120, 298; 1 *Paige*, 188; 9 *How. Pr. R.* 214; 2 *Comst.* 500; 6 *Cowen.* 333; 5 *Barb.* 312, 398; 11 *Paige*, 49.)

The plaintiff was entitled to interest on the moneys he advanced individually in paying the debts of the firm; and when it was agreed between the plaintiff and the deceased that the former should, "at the proper costs and charges of the two, take charge of and proceed to collect all the debts due to the said firm," the deceased became liable to pay the plaintiff one half the value of his services, which he should necessarily render in collecting such debts; and for this reason I think the referee did right in allowing the plaintiff commissions on the moneys collected by him for the firm. The plaintiff rendered these services after the firm was dissolved, and while the deceased was doing nothing for its benefit; and I infer from this, as well as from the language of the agreement between the partners, that it was understood by both of them that the plaintiff was to be paid for all services necessarily rendered by him in collecting the debts due to the firm.

And I am of the opinion the judgment in the action should be affirmed with costs; but the course which the cause has taken, has been such, that the defendants should not be made

personally liable for such costs. They must therefore be made only out of the land described in the complaint.

MASON, J., concurred in affirming the judgment. GRAY, J., dissented.

Judgment affirmed with costs, to be collected only out of the real estate described in the complaint.

[BROOME GENERAL TERM, January 5, 1858. *Gray*, *Mason* and *Balcom*, Justices.]

MYERS *vs.* DAVIS and others.

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Where there had been mutual dealings between the defendants, who were manufacturers of churns, cultivators, &c., and W. & L., merchants at O., in the course of which, work ordered from the defendants by W. & L. had been from time to time applied on the account of the defendants; and on the 9th of February, 1855, W. & L. ordered from the defendants a quantity of churns and cultivators, to be manufactured and sent to them, agreeing to furnish the zinc necessary for their manufacture, which was accordingly sent to the defendants, and charged in their account; *Held*, that although there was no *express* agreement that the churns and cultivators, when completed, should apply upon the defendants' account, an agreement to that effect would be *implied* from the circumstances; and that upon completing and offering to deliver the churns &c. to W. & L., the defendants were entitled to have the same credited to their account with W. & L., although the latter had in the meantime failed, and assigned their property to the plaintiff in trust for the benefit of creditors.

Held also, that the price of the articles manufactured under this agreement became a debt against W. &. L., which was a good set-off against their account, and formed a good defense to an action thereon, brought by the assignee of W. & L.

Held further, that the manufactory of the defendants being at a distance of 40 miles from the residence of W. & L., and the articles manufactured being of a bulky character, it was not necessary for the defendants to make a manual *tender* of the articles after a refusal to accept the same; that it was sufficient for them to notify W. & L. and the plaintiff that the articles were ready, and to offer to send so many thereof as would suffice to liquidate their indebtedness to W. & L.

Myers v. Davis.

THIS action was brought by the plaintiff as assignee of Watrous & Lawrence, an insolvent firm in Ogdensburgh, to recover against the defendants, as copartners, the balance of an account for goods sold and money advanced on exchange of notes, and interest. The complaint averred an assignment of the demand to the plaintiff for the benefit of creditors, and claimed to recover $491.38. The answer was 1. A general denial of the complaint. 2. An allegation that on the 7th Feb. 1855, Watrous & Lawrence ordered from the defendants, and requested them to manufacture and send them, one hundred churns of different numbers, and also twenty iron-tooth cultivators, and thirty steel-tooth cultivators; that it was agreed that Watrous & Lawrence should furnish materials therefor, and that all such materials and any other goods the defendants might purchase from Watrous & Lawrence should apply on and towards the price of said churns and cultivators; that pursuant to that agreement, the defendants purchased the goods mentioned in the complaint; that they fulfilled the order with diligence, and tendered and offered the churns and cultivators, on their completion, to Watrous & Lawrence and to the plaintiff, on the 30th of March, 1855; that the price of the churns and cultivators was more than the account, and the defendants requested Watrous & Lawrence and the plaintiff to accept the same and pay the difference, which they refused to do; that said defendants still have said churns and cultivators ready for the plaintiff; and that the goods in the complaint mentioned were used in making, and form a part of, the said churns and cultivators. 3. The answer set up by way of counter claim, that before the assignment to the plaintiff, Watrous & Lawrence were indebted to the defendants in the sum of $700, for work, and labor and materials, and for divers churns and cultivators, by the defendants before then bargained and sold to Watrous & Lawrence. The plaintiff replied denying the counter claim. The cause was tried at the St. Lawrence circuit, without a jury. The judge who presided at the trial found the following facts: That, for several

years previous to the 20th of March, 1855, the firm of Watrous & Lawrence were doing business at Ogdensburgh; that they stopped payment on that day, and assigned all their property and effects to the plaintiff in trust for their creditors; that among the debts so assigned was an account against the defendants, amounting to $491.38, to recover which the action was brought; that previous to said assignment there had been mutual deal between the firm of Watrous & Lawrence and the defendants, in which work ordered from the defendants was applied on their account; that in their deal the defendants were entitled to a credit of six months; that on the 7th of February, 1858, Watrous & Lawrence ordered from the defendants, to be manufactured and sent to them, one hundred patent churns and fifty cultivators; that Watrous & Lawrence were to furnish, and did furnish, the zinc for the manufacture of the churns, which was received of the defendants on the 23d of March, 1855, and is one of the items charged in the account sued on, at $133.10; that the churns and cultivators were all finished and ready to be sent forward about the middle of May, 1855, and within a reasonable time after they were ordered, considering the means of manufacture possessed by the defendants; that neither the churns or cultivators were ever sent to the plaintiff or to Watrous & Lawrence; that on the 21st of May, 1855, the defendants gave notice to Watrous & Lawrence and to the plaintiff, that the churns and cultivators were completed and ready to be sent, on receiving security for the balance which would be due them, or they would send, of the articles, to the amount of the account for which suit was brought; that the plaintiff said it was too late, he had no use for the articles, and would not receive them; that there was no proof of any previous demand of the articles or any part of them by the plaintiff or Watrous & Lawrence, nor was there any notice to the defendants from Watrous & Lawrence, or the plaintiff, not to manufacture or fulfill the order; that the defendants' place of business was at Brasher's Falls, where the churns

were manufactured, about 40 miles from Ogdensburgh; that the articles were very bulky and could not be tendered in kind, without great inconvenience and expense; that the value of the churns and cultivators was $647, exceeding the account by $155.62; that the churns and cultivators still remain on hand at Brasher's Falls; that there was no *express* agreement that the churns and cultivators should apply on the account sued upon. Upon these facts the judge decided that the offer made by the defendants on the 21st day of May, 1855, followed by a refusal to accept, together with the bulky character of the articles, was a sufficient excuse for not tendering the articles themselves; that the insolvency of Watrous & Lawrence, after the manufacture of the articles was commenced and before they were completed, entitled the defendants to demand pay or security for the overplus, before sending the property, and that an offer to deliver sufficient to pay their account, had it been accepted, would have entitled the plaintiff to so much of the property, without assuming to pay the overplus; that the work having been performed in pursuance of the orders except when performance was excused by the circumstances of the case, the price of the manufacture became a debt against Watrous & Lawrence, which was a good set-off against the account, and a good defense to the action. The judge therefore ordered the complaint to be dismissed with costs, and the plaintiff excepted. Judgment was entered on the finding and order of the judge, from which the plaintiff appealed.

Charles G. Myers, plaintiff, in person.

Brown & Spencer, for the defendants.

By the Court, C. L. ALLEN, P. J. The defendants' counsel insists that the justice finds no such special agreement as alleged in the second answer of the defendants. It is true that the finding states that there was no *express agreement;* but that there had been mutual deal, between the defendants

and Watrous & Lawrence, previous to the assignment, in which work ordered from the defendants was applied on their account; that on the 9th of February, 1855, Watrous & Lawrence ordered from the defendants the churns and cultivators, mentioned in the answer, and were to furnish the zinc necessary for their manufacture, which is one of the items charged in the plaintiff's account. At the same time the order was sent, and at the bottom of it, were these words: "*If you want zinc let us know immediately;*" and as late as the 26th of March, 1855, Watrous & Lawrence, in writing to the defendants, and sending them the amount of their account as then claimed at $470.19, say as follows: "Your farther order is just at hand and being filled for the morrow. We are glad to see you dipping in again, *and suppose our order once completed for churns*, we *shall owe you.*" Taking all these circumstances together, in connection with the testimony of the parties and the other evidence in the case, I think there can be little doubt but an implied agreement was proved that the churns and cultivators should apply upon the account of Watrous & Lawence against the defendants. Why should they inquire in the order, if zinc was wanted immediately, and why should they write on the 26th of March, 1855, that when the order for the churns was completed they should owe the defendants, unless it was perfectly understood between the parties, that they were to be applied in payment of the account? They had been in the habit of dealing in this same manner before, so long, that it was always understood that whatever was made for Watrous & Lawrence, by the defendants, should be offset, on account. The order amounted to a request to the defendants to manufacture the churns and cultivators with ordinary diligence. It is proper we should consider that fact with other evidence in the case. One of the defendants testified that it was expressly agreed, between Watrous & Lawrence and the defendants, that the former should furnish zinc for the churns. This was before the writ-

ten order of the 7th of February, and the evidence was objected to for that reason; but I think it was proper as going to show what was intended by the order. In construing any writing, say the court of appeals in *Blossom* v. *Griffin*, (3 *Kern.* 569, 574,) "it is proper to look at all the *surrounding circumstances, the pre-existing relation between the parties, and then to see what they mean to speak.*"

At all events, the price of the manufacture became a debt against Watrous & Lawrence, which was a good set-off against their account, and formed a good defense to this action; unless the defendants failed to fulfill the order on their part, agreeably to its stipulations. The plaintiff's *first* objection on this ground is, that by the order the articles were to be *sent* to Watrous & Lawrence; that the contract therefore was executory, and no rights under it accrued to the defendants until it was fulfilled on their part. That the articles were never "*sent,*" and the contract therefore never performed. It does not appear that this objection was taken at the trial; but if it was, I think the defendants showed a sufficient excuse for not sending or tendering the articles. They were very bulky, and at a distance from the place of residence of Watrous & Lawrence. It was not practicable to make a manual tender. But the defendants offered, on the 21st of May, to send so many of them as would in value liquidate the amount of their indebtedness to Watrous & Lawrence, and to send the whole, if the plaintiff as assignee would secure to them the balance which would be due to them after deducting their account. To this proposition the plaintiff refused to accede, alleging as his sole reason, that *the defendants were too late;* that "*the manufacture of them was too late—they should have been manufactured before.*" Besides, the failure of Watrous & Lawrence, coupled with the plaintiff's refusal to have any thing to do with the property, dispensed with the necessity of a formal tender. It would only have been imposing an unnecessary expense upon one of the parties. I think it is too late

to interpose this objection at this time, and that at all events it is answered by the evidence.

But the plaintiff insists that no time being specified in the order, it should have been complied with within a reasonable time. That the offer to comply was not made until the 19th May, when the best of the season for selling such articles had passed. The testimony on this point was a little variant. The weight of it, however, was, that the best time for selling was in May and June. Be this as it may, the justice who tried the cause has found the fact that the articles were ready to be sent forward about the middle of May, and within a reasonable time after they were ordered, considering the means of manufacture possessed by the defendants; and he adjudged as matter of law, that the offer made, to deliver on the 21st of May, followed by a refusal to accept, together with the bulky character of the articles, was a sufficient excuse for not tendering the articles themselves. In this conclusion I think he was correct. The zinc was to be furnished by Watrous & Lawrence. It was not forwarded until the 20th March; and as late as the 26th, as appears by their letter of that date, they contemplated receiving the articles in a reasonable time thereafter, for they say we "*suppose our order once completed for churns, we shall owe you.*" They knew the situation and means possessed by the defendants for manufacturing the article; and they did not require, nor had they any reason to expect, that the defendants would enlarge their shops, or erect new ones, for the purpose of expediting their order.

It is said the offer of 21st May was invalid, because the articles were not separated from others of a like description, and no title passed to the plaintiff. The justice has substantially found otherwise, and I do not so understand the evidence. It is sufficient, however, to observe, that the plaintiff did not put himself upon this ground at the trial, nor on the other ground sought to be taken here, that the teeth were not

placed in the cultivators. If either objection had been taken at the proper time, it might have been obviated. They cannot be urged now for the first time.

The judgment should be affirmed.

[MONTGOMERY GENERAL TERM, January 5, 1858. *C. L. Allen, James* and *Rosekrans*, Justices.]

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26 374
7L 404
36h 586

ALLEN *vs.* COOK.

The right of an individual filing the notice specified in the act of April 10, 1850 (*Laws of* 1850, *ch.* 260) relative to homestead exemptions, to have his homestead protected from sale under execution, so long as he continues to occupy it, with his family, is a personal right, which he cannot convey to another by a deed of the premises, so as to enable the latter to hold the property, as against a judgment creditor of his grantor.

Thus, where P., being the owner of a house and lot of the value of $1000, on the 27th of August. 1853, procured to be recorded in the county clerk's office a notice of his design to hold said house and lot as a homestead under the said act of April 10, 1850, and subsequently C. recovered a judgment against him, which was docketed December 3, 1856, and on the 1st of January, 1857, while the premises were occupied by P. with his family, he conveyed the same to A. by deed; *Held* that P. had no right to sell and convey the property, so as to exempt the same, in the hands of the grantee, from levy and sale upon an execution issued on the judgment.

CASE under section 372 of the code of procedure, submitting to the court a controversy between the parties, with respect to the liability of real estate of the plaintiff to the lien of a judgment of the defendant against one Almon D. Packard, the plaintiff's grantor. On the 3d day of December, 1856, W. W. Cook, the defendant herein, recovered judgment against one Almon D. Packard, for $84.50, on a debt contracted subsequent to September, 1853, in the supreme court, which judgment was duly docketed, and the roll thereof filed in the clerk's office of Saratoga county, on said day, which judgment ever since then has remained wholly unsatisfied. For some time previous to the recovery of said judgment, tc

wit, in the year 1853, the said Packard had owned a dwelling house and lot, in the village of Saratoga Springs, in said county, and situated on Washington street, of the value of $1000. On the 27th day of August, 1853, Packard, pursuant to chapter 260 of the session laws of 1850, procured to be recorded in a book called the "Homestead Exemption Book," provided and kept by the clerk of said county for that purpose, a notice in due form of law, duly executed and acknowledged, stating that it was the design of said Packard to hold said house and lot as a homestead, under chapter 260 of the laws of 1850, and he did every thing required by law to be done to effect that purpose. The premises were occupied by said Packard, who was a householder having a family, up to and after January 1, 1857. Subsequent to the recovery of said judgment, to wit, on the 1st day of January, 1857, said Packard by deed conveyed said house and lot to Richard L. Allen, the plaintiff herein. On or about the 24th day of March, 1857, the defendant herein caused execution, in due form of law, and in the usual form of executions, to be issued on said judgment against Packard, directed to the sheriff of Saratoga county, requiring him to satisfy the said judgment out of the personal property of said Packard, and if sufficient thereof could not be found, then out of the real property in said county belonging to him on the day on which such judgment was docketed. And no personal property of said Packard being found, the sheriff, pursuant to law in such cases, proceeded to give the usual notice of sale of said house and lot, on said judgment, notwithstanding the recording of notice as aforesaid. It was stipulated that no other question should be made on this submission than this: Has said judgment ever become a lien on said property; and, under the circumstances, is the same liable to satisfy said judgment? And in case the court should be of the opinion that the lien of the judgment ever did attach to said property, and that the same is liable to the satisfaction of said judgment, then it was agreed that said sheriff proceed to sell the premises, and the defendant have

judgment against the plaintiff for $10 and his disbursements herein; and if the court should be of the opinion that said judgment was not a lien on said property, and that said property was not liable to satisfy said judgment, then that a rule or order be made, enjoining the defendant and sheriff from selling said property in satisfaction of the execution and judgment, and that the plaintiff herein have judgment for $10 costs, besides his disbursements. And that no other costs be allowed.

J. R. Putnam, for the plaintiff.

L. B. Pike, for the defendant.

By the Court, C. L. ALLEN, P. J. This is the first time, to my knowledge, that the question presented in this case has arisen in the courts of this state. We are now called upon to put a judicial construction upon a statute which, like many others, contains provisions in derogation of the common law, and which the defendant's counsel contends is, like them, to be strictly complied with in its several provisions.

It is unnecessary to refer to the condition of things which existed at the time when the rule was originated by Lord Coke, when he said, "The wisdom of the judges and sages of the law has always suppressed new and subtile inventions, in derogation of the common law." (*Coke, Inst.* 282 *b*, *L.* 9, § 485.) That rule, though somewhat relaxed, has been considered by some as well established, and as continuing to the present day. It has been frequently applied to cases arising under the various acts relating to the exemption from levy and sale under execution of the personal property of the debtor, and we are told that we need not hesitate to apply it to the present statute. By the laws of 1850, chapter 260, § 1, it is provided that "In addition to the property now exempt, by law, from sale under execution, there shall be exempt by law from sale on execution, for debts hereafter contracted, the lot and build-

ings thereon, occupied as a residence and owned by the debtor being a householder, and having a family, to the value of one thousand dollars. Such exemption shall continue *after the death* of such householder, for the benefit of the widow and family, some or one of them, continuing to occupy such homestead, until the youngest child becomes 21 years of age, and until the death of the widow. And no *release* or waiver of such exemption, shall be valid, unless the same shall be in writing, subscribed by such householder, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged."

The 2d section declares that, "to entitle any property to such exemption, the conveyance of the same shall show that it is *designed to be held* as a homestead under this act, or if already purchased, or the conveyance does not show such design, a notice that the same is designed to be so held shall be executed and acknowledged by the person owning the said property, which shall contain a full description thereof, and shall be recorded in the office of the clerk of the county in which the said property is situated, in a book to be provided for that purpose, and known as the homestead exemption book." (2 *R. S. 4th ed.* 615, § 26.)

On the 27th of August, 1853, Almon D. Packard owned a house and lot in the village of Saratoga Springs, of the value of $1000, and on that day procured to be recorded in the "Homestead Exemption Book," kept by the clerk of that county, a notice executed and acknowledged as required by the act, stating that it was his design *to hold said house and lot* as a homestead under the act. He was at this time occupying the premises and was a householder then having a family, and so continued to reside with his family up to the first day of January, 1857, when he conveyed the premises to the plaintiff in this action.

The defendant recovered a judgment against Packard for $84.50, on a debt contracted subsequent to September, 1853, which was docketed in the clerk's office of Saratoga county on

the 3d of December, 1856; and on the 24th of March, 1857, he issued an execution on his judgment to the sheriff of that county, who, for want of sufficient property on which to levy, proceeded to give the usual notice for the sale of the house and lot thus conveyed to the plaintiff. The only question submitted for the consideration of the court is, "Has said judgment ever become a lien on said property, and under the circumstances, is the same liable to satisfy said judgment?"

It is to be observed that the act was not intended to discharge, and does not in fact discharge, absolutely, the *lien* of the judgment. It suspends its operation, however. The property is to be exempt from *sale on execution*, during the life of the debtor, provided he continues to be a householder, and during the life of his widow if he leaves one, and until his youngest child arrives at the age of 21 years, if they continue to occupy such homestead. Notice is to be given in the manner required by the act, so that not only persons with whom the individual may contract shall be apprised of the fact, but also that all may know that the property is held as a homestead exemption. No purchaser, therefore, can complain, or insist that he is to be protected as a bona fide grantee of such premises, unless the act authorizes, or was intended to authorize, such sale and purchase, and continues the exemption afterwards from sale under execution.

It has been already remarked that the defendant's counsel insists, that statutes in derogation of the common law are to be construed strictly. And yet the rule, in some of the courts, has been sometimes modified on the one hand, and on the other rigidly adhered to. Thus under the act exempting one cow owned by any person being a householder, it has been held that being intended for the benefit of poor families, the father or head of the family who had left the state, leaving his wife and children living together, is a householder within the meaning of the act. (*Woodward* v. *Murray*, 18 *John.* 400.) So where the family are in the act of removing from one house to another, their only cow has been exempted from execution. And again,

where a person being a householder and having a family, had wool, or articles manufactured from it not exceeding in quantity the fleeces from ten sheep, it was decided that they were exempt from execution *under the equity of the statute*, notwithstanding the person did not own any sheep. (*Hall* v. *Pinney*, 11 *Wend.* 44. *Brackett* v. *Watkins*, 21 *id.* 68.) In Massachusetts it was said, in one case, that although statutes made in derogation of the common law were to be construed *strictly*, yet they were also to be construed *sensibly*, and with a view to the object aimed at by the legislature; and it was held that the statute exempting one cow and one *swine* applied to the animal whether alive or dead. (*Gibson* v. *Jenney*, 15 *Mass. Rep.* 205, 6.)

On the other hand, the courts have said that statutes exempting a debtor's property from liability for his debts *are not remedial*, and are not entitled to a peculiarly liberal construction; and accordingly it was held that necessary food for a team exempt from execution under the act of 1842, is not also exempt, because not declared to be so in the act. (*Rue* v. *Alter*, 5 *Denio*, 119.) Necessary wearing apparel is not exempted in all cases, but only when it is owned by the householder or head of the family. The exemption, it is true, extends to apparel furnished by him for the use of others living with him, but does not embrace the clothing of one living with the family who provides them for himself. (*Bowne* v. *Witt*, 19 *Wend.* 475.) And cases might be multiplied in support of either proposition, viz: that these statutes exempting personal property from levy and sale under execution *are remedial*, and *are not remedial*; affirming the correctness of the motto, adopted by a distinguished writer on statute and constitutional law: "*Great is the mystery of judicial interpretation.*"

It will be seen that the *intention* of the legislature has been often sought after, and supposed to have been arrived at by the courts, in construing many of these statutes; and it may perhaps be concluded, that at the present day there is really no good

reason why they should be regarded with undue and over strict severity. The present statute, like those we have been commenting upon, is a *humane one*, intended not only for the benefit of the debtor but for his wife and children; and it is said we may construe it liberally so as to carry into effect the intent of the legislature. It is undoubtedly a cardinal rule, in construing statutes of doubtful provisions, to ascertain, if possible, the intention of the legislature. One principle, however, we must certainly adhere to, and that is to be careful not to overstep the bounds of judicial construction, so as to assume functions which belong exclusively to the legislative body. "Arguments drawn from hardship, impolicy or inconvenience," says Justice Story, "are entitled to little weight. The only sound principle is to declare '*ita lex scripta est*;' and it would be going too far to make exceptions which the legislature has not made." "A court of law ought not to be influenced," says another distinguished jurist, "or governed by any notions of hardship; cases may require *legislative interference*, but judges cannot modify the law." The letter of the present statute is plain and entirely free from doubt and ambiguity. The *lien of a judgment* upon the exempt realty is *clearly preserved*, but the *remedy is suspended*, until the debtor ceases to be a householder. Suppose, the day or month after he has secured his right, his wife should die, and his children all having arrived at the age of 21 years, the debtor should remove from the premises; unquestionably they might be sold under an execution: and suppose that the debtor, the day before these casualties happened, should convey the property to a third person, would it be exempt from such sale? I apprehend not. Could he then convey while he was such householder, and go out of possession of the property, and resort to a boarding house with his family; or could he, if disposed, sell the property, put the money into his pocket and abscond, leaving his family entirely unprovided for, and the purchaser be protected against the sale under execution? I think not; for in that event the main object of the law would be frustrated, and the

intention of the legislature to provide a home for his *family*, as well as for the debtor himself, be entirely defeated, and he be enabled to practice a fraud upon his creditors and the community. Such, clearly, could not have been the intention of the act. It is entirely silent as to the right of the debtor to sell and convey his homestead; nor does it declare that the purchaser shall have any right, beyond those which he would acquire under an ordinary conveyance of real property subject to existing liens and incumbrances. It is argued that Packard could convey as good a title as he himself had in the house and lot in question. This may be true in the abstract. He had the legal title at common law, subject to such liens as might have been acquired against it; and he had the right to have his homestead protected from sale under execution, so long as he continued to hold and occupy and enjoy it with his family; but he could not convey away *this personal right.* (*Earl* v. *Camp*, 16 *Wend.* 562. *Mickles* v. *Tousley*, 1 *Cowen*, 114.) It is sufficient to remark that this exemption is not *made assignable* by the act. "*It is not so written in the law,*" and we cannot, as judges, so write it: that must be done by the legislature. That the legislature did not intend to confer the power to sell, is pretty conclusive from the fact that the act provides that the exemption shall continue after the death of the debtor, for the benefit of his widow and family, "some or one of them, continuing to occupy such homestead, until the youngest child becomes 21 years of age, *and until the death of the widow.*" But for this provision the right to sell under execution would have been complete on the death of the debtor.

It is conceded by the plaintiff's counsel, that the law is made solely for the benefit of the person who takes the steps necessary to avail himself of its provisions, and of his family. But the counsel insists that if he sells the property thus made exempt, the creditor is not injured, because having notice of such exemption, before the debt was contracted, he had no rights in the property while it was owned by the debtor, and

the latter by being authorized to make an exchange, or a sale and new purchase, might be benefited thereby; and to be deprived of this might prove a great hardship, and would in a great measure destroy the force and utility of the law. But we have already observed that we are not at liberty to regard hardship or inconvenience when construing the words of a statute plain and intelligible, nor to extend or add to its provisions. It is sufficient that the enacting power has not seen fit to incorporate the necessary language to authorize the court to sanction the construction asked for, and that it is only in doubtful cases, in statutes of this description, that an equitable or liberal interpretation may be allowed. The legislature shall be intended to mean what they have plainly expressed, and consequently no room is left for construction. (*Sedgwick on Stat. and Const. Law*, 379, *note.*) It has been well remarked, that "in cases where the intent of the legislature is ambiguous, and the effort to arrive at it is hopeless, and in these cases only, does the power of construing a statute strictly or liberally exist. Where the language is explicit the courts are bound to seek for it in the words of the act, and are not at liberty to suppose that they intended any thing different from what their language imports." (*Sedg. on Const. and Statute Law*, 380, *and note*, 382, 3.) Besides, to adopt the views of the plaintiff's counsel might lead to the perpetration of more mischief than all the benefits which could be derived in particular cases. The legislature, for some good reasons, probably, did not see fit to authorize the debtor to sell and convey, so as to exempt the property from sale after coming to the hands of the grantee; or if it intended to do so, it has not declared such intention in the law. If it is an omission, we cannot supply it. In the language of Mr. Justice Buller, in *Jones* v. *Smart*, (1 *T. R.* 44, 52,) "We are bound to take the act of" the legislature "as it has been made. A *casus omissus* can in no case be supplied, by a court of law, for that would be to make laws; nor can I conceive that it is our province to consider whether such a law that has been passed

be tyrannical [and he might have added *sufficiently wise and liberal* in its provisions] *or not.*" (*And see Sedg. on Stat. and Const. Law*, 911, 12; *Priestman* v. *The United States*, 4 *Dall.* 30, *n.* 1, *and cases before cited.*)

The defendant is entitled to judgment, according to the stipulation in the case.

[MONTGOMERY GENERAL TERM, January 5, 1858. *C. L. Allen, James* and *Rosekrans*, Justices.]

MUNRO *vs.* MERCHANT.

26 383
28 660
64 526
66 567
2h 610
28a 9

A party claiming lands under a partition made in pursuance of the colonial act passed January 8, 1762, must prove the regular appointment of the three commissioners specified therein.

A recital, in a book containing a record of the proceedings of the commissioners in making partition, which states that C. Y., J. G. and T. P. were appointed commissioners by virtue of the act of January 8, 1762, "by a writing of the purport directed in and by the said act, and subscribed by W. S. jun., B. K. and P. R., *styling themselves* in the same three of the proprietors of the said tract of land, and which has been, according to the directions of the said act, published," &c. is not legal proof of the appointment of the commissioners.

Such a recital, were there no other objection to it, would be defective for not showing that the persons making the appointment were in fact "proprietors" of the land to be partitioned, or that the commissioners had any evidence that they were such.

The appointment of the commissioners, in the manner specified in the 7th section of the act, is requisite in order to confer any power upon them, or give them any legal existence. Their appointment is therefore a vital jurisdictional fact, a *recital* of which by the persons appointed would not be evidence, unless it was expressly made so by the act providing for it.

Facts in a recital, so far as they are material *to give jurisdiction*, must be proved, in the ordinary way.

The 11th section of the act of January 8, 1762, which made "the balloting and all the proceedings" in partition, when entered in the books required, good evidence of the partition, did not make the recital of the appointment of the commissioners good evidence.

Where a testator gave to his three executors, or the survivors or survivor of them, power to sell and convey his real estate, and the plaintiff claimed

under a conveyance of a portion of the land, purporting to be executed by one of the executors, as survivor of the others; *Held*, that in order to prove the death of two of the executors, the plaintiff might read in evidence exemplified copies of their respective wills, and the letters of administration granted thereon, by the surrogate, as *prima facie* evidence of their deaths.

Where, at the date of the treaty of 1794, between the United States and Great Britain, M. a British subject, was the owner of land in this state, by virtue of a conveyance executed in 1774, and he died, an alien, in 1802; *Held* that M. being alive at the date of the treaty, he and his heirs were entitled to be protected, under the 9th article of such treaty, notwithstanding they had no possession under their title; and that the son of M., although also an alien, could take the lands by descent from his father.

A child born in this state of alien parents, during its mother's temporary sojourn here, is a native born citizen.

The term "heirs or assigns," in the 9th article of the treaty of 1794, is not to be confined to the immediate descendants of the alien, but is to be extended indefinitely till the title comes to a citizen.

In 1797, P. G. jun. entered into possession of a tract of timbered land, consisting of about 1500 acres, claiming title under a deed of conveyance, and lumber was cut in all parts of it, indiscriminately, for years, down to the year 1820, during which time about 300 acres of the tract was cleared. From 1820 to 1846 about 100 acres more were cleared. During all this time P. G. jun. resided in Albany. In 1801 his son H. G. took charge of the land as his agent, and so continued till 1812, when he and his brother took a lease of the premises. No portion of the lot had been designated as a wood or fencing timber lot, and no part, except the cleared portions, had been fenced. P. G. jun. and H. G. had paid the taxes on the whole tract. It was proved, in relation to two adjacent tracts, that it was not the custom to inclose timber lands by a fence. Fire wood was cut by H. G. to send to his mother; and by some of the tenants, on the tract, generally; but there was no proof that fuel or fencing timber had ever been taken from any particular portion. *Held*, in an action of ejectment for a portion of the tract, that the same had not been used for the supply of fuel or fencing timber for the purposes of husbandry, or the ordinary use of the occupant, within the meaning of the statute relative to adverse possession. (2 *R. S.* 222, § 10, *subd.* 3.)

Held also, that the case did not come within the 4th subdivision of the 10th section of the same statute which provides that where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved or cultivated.

A certified copy of the registry of a mortgage, which mortgage was registered in pursuance of the colonial act of December 12, 1773, is not evidence of the execution of the mortgage by the mortgagor.

Munro *v.* Merchant.

A mortgagee being in possession of the mortgaged premises, after a forfeiture, is entitled to retain his possession, as against the mortgagor and those claiming under him, until his debt is paid.

And where there is a possession after the forfeiture, a sufficient length of time to bar an entry, such possession, it seems, will be presumed to have been under legal proceedings, or with the assent of the mortgagor.

Where there is no dispute in regard to the facts, the question whether a constructive adverse possession has been shown, is one of law, for the court to determine, and not for the jury.

The doctrine of submitting a case to the jury upon the presumption of a conveyance, for the purpose of upholding the possession, after a great lapse of time, does not apply to a case where the question is purely one of constructive adverse possession, founded upon an instrument in writing and an actual possession of a small portion of the land conveyed.

THIS was an action of ejectment, brought to recover possession of about sixteen acres of land in lot number two of the 20th allotment of the Kayaderosseras patent, situate in the town of Northumberland in the county of Saratoga. The complaint was in the usual form, and the answer set up four defenses: 1. A general denial of the complaint. 2. Title in the defendant. 3. Adverse possession for more than 30 years. 4. Alienism of the plaintiff and his ancestors. The cause was tried at the Saratoga circuit, in May, 1856. The plaintiff claimed to deduce title from Rip Van Dam, one of the original thirteen patentees. The patent was granted in 1708. The patent and field book of the partition, and the original map, were produced and read in evidence. The plaintiff's counsel also introduced and read the following act of 1762, entitled "An act for the more effectual collecting of his majesty's quitrents in the colony of New York, and for the partition of lands in order thereto," and also the act of 1768, continuing the foregoing act; also an exemplified copy of the will of Rip Van Dam, bearing date 16th June, 1746, by which Isaac Van Dam, Robert Livingston and Thomas Moone were appointed his executors, with power to sell all his real estate, with one or two specific exceptions. The proceedings of the commissioners to make partition were also introduced and read in evidence, by which it appeared that lot No. 2 of the 20th

allotment was drawn to Rip Van Dam. The counsel for the defendant objected to the evidence as to the partition, on the following grounds: 1. That there was no proper or sufficient evidence of the authority of the commissioners to make the partition. 2. That there was no evidence, by record of commission or otherwise, of the subscription of the writing or publication of the notice required by section two of the act of 1762. 3. That there was no evidence that the record was executed by the commissioners, and the record furnished no evidence of partition among the owners. 4. That the evidence as to the partition was immaterial and incompetent. The counsel for the plaintiff objected—5. That the partition of the patent was made after the death of Rip Van Dam, and there was no evidence of notice of the partition, to his heirs or executors, and there was no evidence of assent by either. The objections were severally overruled, and the defendant's counsel excepted. The plaintiff further offered in evidence exemplified copies of the wills of Isaac Van Dam and Thomas Moone, and of the letters testamentary granted thereon, the former in the year 1750, and the latter in 1756. This evidence was offered to prove the death of the two testators, and was objected to as not sufficient proof of that fact, and as immaterial. The objections were overruled, and the defendant's counsel excepted. The plaintiff next introduced in evidence an exemplified copy of a deed from Robert Livingston, jun., as surviving executor of Rip Van Dam, dated October 24, 1771, to Jacob Walton, Isaac Low and Anthony Van Dam, conveying to them all the interest of Rip Van Dam in the Kayaderosseras patent, and *specifically* lot No. 2 in the 22d allotment of said patent. The plaintiff also introduced in evidence an exemplified copy of a deed from Walton, Low and Van Dam to Hugh Monro, dated 30th August, 1844, conveying to him the greater part of lot No. 2, and including the premises in question. The depositions of Hugh Munro and Grace Munro, taken in Canada, under a commission, were also read in evidence, by which it appeared that the father of the witness

Hugh was also named Hugh Munro; that a year or two before the revolutionary war he resided upon lands in Saratoga county, near Fort Miller; that shortly before the commencement of hostilities, he went to Canada, leaving his wife and children in Saratoga county; that he never returned to the United States, but after living a few years in Montreal, he took up his residence in Edwardsburgh, Upper Canada, where he continued to live until his death, in 1802. The depositions further showed that the wife of the elder Hugh Munro, shortly after her husband went to Canada, took the children to the city of New York, at which place she and all the children except the witness Hugh died before the close of the revolutionary war. That soon after the peace, the witness Hugh went to Canada and resided with his father till his death. That his father died without a will, leaving the witness Hugh his only child and heir at law. That the plaintiff was born near Ballston in Saratoga county; he remained there with his mother for nearly a year after his birth, and then was brought by his mother to his father's residence in Canada and lived there about twenty years. Afterwards he lived at Toronto and other places, till he finally went to Rochester to reside, about five years ago, where he still resides. His mother went to Ballston to be delivered of the plaintiff; his father living in Canada at the time. The plaintiff proved a judgment recovered by Peter Gansevoort against Hugh Monro, (the witness,) and an execution under which the lot No. 2, including the premises in question, was sold; also a judgment in favor of the plaintiff by confession, against the said Hugh Monro, under which the premises were redeemed in March, 1854, and conveyed by the sheriff of Saratoga county to the plaintiff, by deed dated 20th March, 1854. The defendant admitted he was in possession of the premises in question at the time of the commencement of the action. The defendant's counsel moved for a nonsuit on the grounds 1. That there was no evidence of title in the plaintiff. 2. That the proof of partition was defective. 3. That the conveyance from Livingston to

Walton and others was irregular and invalid, for the reasons that there was no sufficient evidence of the death of his co-executors, and he had no power, solely, to transfer the title; and that Livingston never qualified as executor. 4. That there was no sufficient evidence of the identity of either of the Hugh Munros through whom the plaintiff claims. 5. That Hugh Monro the elder was an alien and incompetent to take, or transmit, the lands in question. 6. The same as to Hugh Munro the younger. 7. The same as to the plaintiff. The motion was denied, and the defendant's counsel excepted.

The plaintiff then read in evidence, 1. An act of the legislature of New York, passed 22d October, 1779, declaring the attainder of Isaac Low in the year 1779, which was objected to by the plaintiff's counsel as irrelevant and immaterial. The objection was overruled and the plaintiff's counsel excepted. 2. A deed from Anthony Van Dam by Gerard Walton, his attorney, to Peter Gansevoort, jun., dated 17th July, 1797, covering the lands in question. 3. An exemplified copy of the record of the will of Peter Gansevoort, jun., dated 22d September, 1807, and of the codicil thereto, dated 22d June, 1811, and both proved 1st June, 1814, by which the premises in question were devised to his wife Catharine Gansevoort. 4. An exemplified copy of the will of Catharine Gansevoort, proved 27th April, 1831, by which she devised the said premises to her two executors, Peter Gansevoort and Herman Gansevoort, with power to sell and convey. 5. A deed from Herman and Peter Gansevoort, the said executors, to Ransom Sutfin and others, dated 2d November, 1841, conveying the premises in question. 6. A deed from Ransom Sutfin and others to the defendants, dated January 29, 1848, conveying the north half of lot No. 14 on Stearns' map, and including the premises in suit. The counsel for the defendant then offered in evidence a certified copy of the registry of a mortgage from Hugh Munro to Jacob Walton, Isaac Low and Anthony Van Dam, covering the premises in question. Also the original book of registry of mortgages, from the Albany county clerk's

office, containing the registry of mortgages of indentures from 1771 to December 31, 1782, from which it appeared that all the mortgages registered therein were registered in the same manner and form as the one in question. The defendant's counsel also produced a book of registry of mortgages from the Saratoga county clerk's office, from the year 1791 to 1805, and the mortgages were all registered therein in the same form. The counsel for the plaintiff objected to the introduction of this evidence, as to the registry of the mortgage, as irrelevant and incompetent, and also on the further grounds, 1. That neither such registry, nor a certificate thereof, was made, nor was by any statute or rule or principle of law evidence, for the purpose of proving the original mortgage. 2. That neither the original registry, nor the certificate, were competent evidence of a custom or manner of doing business, or for any other purpose. 3. That no assignment of the mortgage debt was shown, to those under whom the defendant claims. 4. That there was no legal evidence of the due execution of the mortgage alluded to in the registry, either from the book itself, or the certificate. 5. That the mortgage being shown, even, and the assignment also, the possession of the assignee would constitute no defense to this action. These objections were overruled; and the registry and copy were read in evidence, and the plaintiff's counsel excepted.

The defendant then read in evidence the depositions of Herman Gansevoort and others, by which it appeared that Peter Gansevoort, jun. and his successors had occupied the tract of land described in the conveyance from Anthony Van Dam to Peter Gansevoort, jun., in connection with another tract of land, of about equal size, adjoining it on the north. The two tracts together constituted what is called the Gansevoort tract or farm, and contained about 1500 acres. At the date of the instrument, in 1797, there were a few buildings upon that part of the tract, north of lot No. 2. At this time the business of lumbering was carried on by tenants of Gansevoort indiscriminately. This business consisted of getting out timber, sawing

it on the premises and in selling it, and also in rafting away cut timber. About this time the cleared land on the tract amounted to 200 acres, more than half of which lay north of lot No. 2. Between the date of this conveyance and 1812, the lumbering business somewhat increased, and about 100 acres more were cleared. From 1812 to 1820, the lumbering business was still more increased, and was very considerable. About 1820 the lumbering business ceased, and little had since been done by the Gansevoorts, except to sell off parcels of the land. The cleared portions were to a great extent not worked. Between 1820 and 1846, about 100 acres more were cleared, so that at the latter date there were about 400 acres of land cleared, on the tract, of which about one third was on lot No. 2, and the balance north of it. During all this time Peter Gansevoort, jun. resided in Albany, having removed there in 1795 or 6. For a few of the first years after the date of the conveyance from Van Dam, tenants from year to year occupied and worked the premises. In 1801 Herman Gansevoort, a son of P. Gansevoort, jun. took charge of the premises, as agent for his father, and continued to act as such agent till 1812, when Herman and his brother took a lease of the place for twelve years. During this period no portion or lot of the tract had been designated or used as a wood, or fencing-timber lot, by the Gansevoorts, and no part except the cleared portions had been fenced. The lumbering had been general and indiscriminate, over the whole tract, wherever suitable timber could be most conveniently cut. The products of the cleared portion were always used on the premises, for the hands and teams, and were not sufficient for those purposes, so that every year hay and grain were bought for consumption on the place. During this time P. Gansevoort, jun. and those holding under him paid the taxes on the land. Since the defendant came into possession of the premises, and within the last nine years, they had been cleared. A few years before that, they were enclosed.

At the close of the evidence, the defendant's counsel again

moved for a nonsuit, upon the several grounds before specified, and also upon the following additional grounds: 1. That the defendant had established an adverse possession of the premises. 2. That the defendant was to be regarded as a mortgagee in possession, and that the present action could not, therefore, be sustained. The motion was denied, and the defendant's counsel excepted.

The counsel for the defendant then proposed and requested to go to the jury, 1. On the question of adverse possession, and as to the nature and character of the defendant's possession; 2. Whether it was in accordance with the usual course and custom of the adjoining country; 3. Whether the portion left not cleared or not enclosed, was according to such course and custom; 4. Upon the presumption of all necessary conveyances, to uphold the possession of the defendant and his predecessors; and 5. Upon the presumption that the title of the elder Munro had been extinguished, or reconveyed to the grantors of Peter Gansevoort, jun. or to subsequent owners or possessors of the premises. The court denied such proposals and requests of the defendant's counsel, and the defendant excepted.

The jury, under the direction of the court, rendered a verdict in favor of the plaintiff, for that portion of the premises claimed in the complaint, lying on lot No. 2 of the 20th allotment of the Kayaderosseras patent; to which direction of the court the defendant's counsel excepted.

The court ordered the verdict to be taken subject to the opinion of the court at general term; the plaintiff then to move for judgment, and the defendant to have leave to move for a nonsuit.

The plaintiff now moved for judgment, and the defendant for nonsuit.

Munger & Pomeroy, for the plaintiff.

Beach & Smith, for the defendant.

By the Court, C. L. ALLEN, P. J. The first, and perhaps the most important, question which arises in this case is, whether there was sufficient evidence of the appointment of the commissioners to make partition. The 7th section of the colonial act, passed 8th January, 1762, provides "that any one or more of the proprietors of tracts or parcels of tracts still undivided, inclined to have partition thereof, may subscribe a writing, and publish the same in any two of the public newspapers of the colony twelve weeks successively, directed in general to all persons interested in such tract or parcel of land; specifying the bounds thereof and giving notice that three commissioners not interested in such tract or parcel, naming them and their places of abode, are appointed to make such partition, and that they will meet at a certain day and place to be also mentioned, and to be within 10 days after the said 12 weeks are expired, to proceed to the partition of the said lands, and requiring all persons interested therein to attend then and there for that purpose, either by themselves or their attorneys." The section further provides, that if no objection be offered to the commissioners, in writing, in the manner and at the time therein required, that the persons so named shall thenceforth be the commissioners for executing the powers given to such commissioners by the act. Subsequent sections regulate the manner in which the commissioners shall be qualified and discharge their duties, and section eleven enacts, that of all surveys and allotments made, two true field books and maps, specifying the bounds of every lot, shall be made, and the several lots laid down and numbered on the said map, and then signed by the commissioners and their surveyor. The section then proceeds to declare how and in what manner the lots shall be balloted for. "Of which balloting and all the proceedings in such partition the said commissioners shall make a full and fair entry and minute in a book; one copy whereof, certified under their hands, or the hands of the majority of them, and under the hand of the judge or counsellor present, shall be filed in the said secreta-

ry's office; and another certified in like manner, in the clerk's office of that county where the greatest part of the lands lay; *which same books, or an exemplification under the great seal of the colony, shall be good evidence of such partition, and which partition shall be as valid and effectual, in the law, to divide and separate the said lands, as if the same had been made between the patentees, on writs of partition, according to the course of the common law.*"

It was incumbent upon the plaintiff, under this act, to prove the regular appointment of the three commissioners, in pursuance of its provisions. The plaintiff introduced in evidence the original Kayaderosseras patent from Queen Anne to Rip Van Dam, and 12 associates named therein, dated 2d of November, 1708; next the field book of the patent, and the field book of the partition and the original map of the patent. These books were taken from the Saratoga county clerk's office, and bore an indorsement as follows: "Filed 4th day of March, 1771, in the clerk's office of the county of Albany." The proceedings of the commissioners of partition were read in evidence. These proceedings recited, among other things, that Christopher Yates and John Glen, both of Schenectady, in the county of Albany, and Thomas Palmer, of the precinct of New Cornwall, in Orange county, were appointed commissioners, by virtue of the act of 8th of January, 1762, "by a writing of the purport directed in and by the said act, and subscribed by William Smith, jr., Benjamin Kissam and Peter Remsen, (styling themselves in the same, three of the proprietors of the said tract of land,) and which has been, according to the directions of the said act, published, &c." The proceedings subsequently also recited that the notice was directed to all persons interested in the lands mentioned in the patent, and what purported to be the substance of the notice, complying substantially with the requisitions of the act, and which was subscribed by the three persons claiming to be proprietors. The proceedings further contained the subsequent acts of the commissioners, all substantially in compliance with

the act, and by which it appeared that on the ballotings lot No. 2 was drawn to Rip Van Dam. This was all the evidence introduced or offered in proof of the appointment of the commissioners, and it is insisted on the part of the defendant that these recitals in the books of partition are not proof of their appointment.

It was not necessary that the appointment should have been by a court, or other authority than the 7th section required. By that section such appointment was to be made by one or more of the "proprietors" of tracts or parcels of the lands undivided, and who were inclined to have partition thereof, in writing, subscribed by him or them, and published in the papers and in the manner required therein. This was requisite in order to confer any power upon them whatever. It was a jurisdictional fact, necessary to create and give them any legal existence or authority to make partition. A recital therefore of this *vital jurisdictional* fact, would not be any evidence of their appointment, unless it was expressly made so by the act providing for it. Facts in a recital, so far as they are material to give jurisdiction, "must be proved in the ordinary way, without such legislative provision, as the common law knows nothing of that mode of proof." In *Bennett* v. *Burch*, (1 *Denio*, 147,) it was held that an order of the superintendent of common schools reciting matter material to give him jurisdiction to make it, does not prove it. In *Bouchaud* v. *Dias*, (3 *Denio*, 238,) a release recited that the defendant presented his petition to the secretary to be released. The court said "recitals do not prove jurisdictional facts, (*citing Cowen & Hill's Notes to Phil. Ev.* 1014 *to* 1016,) that if the rule were otherwise, inferior courts and magistrates might require jurisdiction by merely affirming the existence of the facts on which jurisdiction depends. An insolvent's discharge is evidence of facts contained in it, because the legislature has so provided in express terms. (11 *John.* 224. 12 *Wend.* 102.") In *Jackson* v. *Shepard*, (7 *Cowen*, 88,) it was held that recitals in a collector's deed of land sold for

taxes, were insufficient to prove the power to sell. In *Wood* v. *Chapin*, (3 *Kern.* 509, 515,) the plaintiff claimed to have acquired title by means of a proceeding under the statute respecting non-resident debtors, and the regularity of the proceeding was questioned. The act (1 *R. S.* 41, § 6) declares that the appointment of trustees shall be conclusive evidence that the debtor therein named was a concealed, absconding, or non-resident debtor, and that the said appointment, and all the proceedings primary thereto, were regular. The court said it had been held that this language must be qualified by a condition that the case is one in which the officer had acquired jurisdiction; (*see Van Alstyne* v. *Erwine*, 1 *Kern.* 331;) that after jurisdiction was shown, the appointment of trustees was incontrovertible evidence that all the other proceedings were in accordance with the statute. In *Hand* v. *Ballou*, (2 *Kern.* 541,) the court held that a comptroller's deed on a sale of land for taxes, was presumptive evidence that the proceedings required by law to authorize the sale and conveyance were had, because the *Laws of* 1850, (*ch.* 183,) made it such evidence. Before that it was regarded as insufficient.

In the present case, none but "*proprietors*" were authorized to make the appointment of commissioners, and that by the subscription of a particular notice in writing. The question naturally arises, *who were proprietors*, within the meaning and intention of the act? Was it some one or more of the original patentees? or did it authorize one or more grantees immediately, or more remotely, from them, or some of them, of their undivided shares, to appoint commissioners? If the term is to be confined to the patentees, then clearly the commissioners in this case were entirely without jurisdiction, as no one of the persons named in the patent "subscribed the notice in writing." But suppose the term might be extended to subsequent grantees; what evidence had the commissioners, or what proof is contained in their recitals, that the persons making the appointment were "*proprietors?*" It may be asked, with much force, as it was upon the argument, who

were Wm. Smith, jun., Benjamin Kissam and Peter Remsen? The commissioners answer, in their proceedings, that they "*styled*" themselves in their notice "*three of the proprietors of the said tract of land.*" But where is the evidence that they were such proprietors? Whose rights had they acquired, and to what extent was their interest? The proceedings are wholly silent in answering, although the commissioners, when they came to ballot, drew ballots for the whole of the original patentees, without regard to assignees, as perhaps they were required to do, by the 11th section, yet they make no allusion whatever to the three persons appointing them, or either one of them. It appears to me that there is a fatal defect in the proof of the appointment of the commissioners, and that the evidence failed to establish the partition through which the plaintiff claims to make title to the whole of the premises in question.

It was contended, on the argument, that the 11th section of the act of 1762 made the proceedings, when entered in the books required, evidence of all the facts recited therein. That section made "the balloting and all the proceedings" in partition, good evidence of such partition. But it did not make the *recital of their appointment* good evidence; that was a matter left by the act to be otherwise proved, by those claiming title under their proceedings. Their recital, at most, was a mere affirmance of the existence of the facts on which their jurisdiction depended—a mere simple declaration of their own title. But it was scarcely that, as it did not show how or under what title the persons appointing them claimed to be proprietors. It was a mere naked assertion, which any other three individuals might have made, and equally have conferred jurisdiction upon the commissioners.

It was also said, on the argument, that the defendant claimed under the same title adversely to the plaintiff's claim. It is sufficient to remark, in answer to this position, that the plaintiff must recover upon the strength of his own title, and that until he has established that title he cannot call upon his ad-

versary to defend. Besides, there is a difference between a valid title, under which a plaintiff entitles himself to recover, and a *colorable* title, under which a defendant enters, and upon which he grounds a defense of adverse possession under the statute.

I think the plaintiff failed to prove the partition, and that therefore, as to the 12-13ths of the premises in question, he was not entitled to recover. This view renders it unnecessary to consider the remaining objections to the proof of the partition, and disposes of the greater part of the plaintiff's claim, so far as the present action is concerned. It is necessary, however, to proceed to an examination of the other questions arising, in order to ascertain whether the plaintiff is entitled or not, to recover possession of the one undivided thirteenth part of the premises in question.

The plaintiff claimed title under the will of Rip Van Dam, which devised his real estate to his executors, with power to sell and convey. The clause in the will conferring this power, authorized and required his executors, Isaac Van Dam, Robert Livingston and Thomas Moone, or the survivors or survivor of them, or the major part of them, to grant, bargain, sell and convey, all his real estate, with one or two exceptions, not affecting the present question. A single surviving executor, under this power, could sell and convey. And the plaintiff, in order to prove the death of Isaac Van Dam and Thomas Moone, two of the executors, introduced and read in evidence exemplified copies of their respective wills, one dated 10th Nov. 1749, and proved 7th May, 1750, and the other dated 1st August, 1756, and proved 16th September, 1756, and letters of administration granted to the respective executors. The counsel for the defendant objected to this evidence as insufficient to prove the death of the testator, but the court overruled the objection, and the defendant's counsel excepted.

Those records were *prima facie* evidence of the deaths of the co-executors of Livingston, as the following authorities, I think, fully show. (1 *Greenl. Ev.* § 550, *and cases cited in*

note. 2 *id.* § 339, 2*d ed.* *Russell* v. *Schuyler*, 22 *Wend*, 277, *McNair* v. *Ragland*, 1 *Denio*, 553.) The deed from Robert Livingston, jr. as surviving executor of Rip Van Dam, to Low, Walton and Van Dam, was therefore properly read in evidence.

The plaintiff then introduced and read in evidence, an exemplified copy of the record of a deed from Low, Walton and Van Dam, conveying the premises in question to Hugh Munro, dated 30th August, 1774, and the depositions of Hugh Munro and Grace Munro, showing that the grantee in the last deed was the father of the witness, Hugh Munro, and that he, the witness, was the sole surviving child and heir at law of his father, who died intestate, in Canada, where the witness resided and still resides. That the plaintiff is the son of these witnesses, and was born about the year 1804 or 1805, near Ballston Spa, in this state. That the plaintiff's father, at the time of his birth, resided in Canada, where he now lives. That his mother went there to be confined, and remained there about a year after the birth of the plaintiff, and then returned with him to his father's residence in Canada, where, and in other places in Canada, he lived until about five years ago, when he went to Rochester in this state, where he now resides. The father and mother of the witness Hugh were both born in Scotland.

The plaintiff then proved the recovery of a judgment in favor of Peter Gansevoort against Hugh Munro, the witness, and an execution issued thereon. Also, the recovery of another judgment against the same Hugh Munro in favor of the plaintiff. And it was admitted by the defendant's counsel, that all the right and interest of the said Hugh Munro, in and to said lot No. 2, was sold on the 18th day of December, 1852, under the judgment and execution in favor of Gansevoort, and duly redeemed on the 9th day of March, 1854, by the plaintiff, under his judgment.

The defendant's counsel then objected that the title of the plaintiff was inoperative by reason of the alienage of the par-

ties through whom he claims. It was conceded by the counsel for the plaintiff, on the argument, that the two Hugh Munros were both aliens. But it was insisted that the war did not affect the rights of property of the elder Munro, inasmuch as the change of the government did not, of itself, work a forfeiture of his previously vested right. (*Orser* v. *Hoag*, 3 *Hill*, 79.) That no forfeiture by government having been shown, his property, at his death, descended to his heirs capable of inheriting. That although, upon common law principles, the younger Munro being an alien, would not have succeeded to the lands of his father, upon the decease of the latter, yet that the 9th article of the treaty of 1794 interposes a bar to the operation of the common law rule. The 9th article is as follows:

"It is agreed that British subjects, who now hold lands in the territories of the United States, and American citizens, who now hold lands in the dominions of his majesty, shall continue to hold them according to the nature and tenor of their respective estates and titles therein, and may *grant*, *sell* or *devise* the same to whom they please, in like manner as if they were natives; and that neither they, nor their *heirs or assigns*, shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens."

Hugh Munro, the elder, died in 1802, having received a conveyance of the premises in August, 1774; consequently his title existed at the date of the treaty, and he being then alive, he and his heirs are entitled to be protected under that treaty, notwithstanding they had no possession under their title. Such have been the decisions both in the supreme court of the United States and in this state. (*Hughes* v. *Edwards*, 9 *Wheat.* 689. *Shanks* v. *Dupret*, 3 *Pet.* 262. 1 *Wheat.* 200. 4 *id.* 453. 7 *id.* 535. *Orser* v. *Hoag*, 3 *Hill*, 79. *Duke of Cumberland* v. *Graves*, 3 *Seld.* 305.) The defendant's counsel contends that the construction of the treaty of 1794 is not controlled by this latter case. It is true, that the questions there arose under the statute of 1798. That

statute provided for conveyances *thereafter* to be made to an alien, and made it lawful for him to hold the same, to his *heirs and assigns forever*. The same objection was taken there as here. The court said the statute must be understood as bestowing upon the land the quality of being inheritable by aliens, until by inheritance or grant the title should come to a citizen; especially as the act provided that it *should not be lawful for the heirs or assigns of any such alien* to recover any rent or service whatsoever to be made of any such lands, &c. The words in the treaty are, "that neither they, nor their *heirs or assigns shall*, so far as may respect the *said lands, and the legal remedies incident thereto, be regarded as aliens.*" I think the case has a very strong bearing on the present, and confirms the decisions previously made.

It is further contended, on the part of the defendant, that the plaintiff himself is an alien. He was born in Ballston Spa, in this state, while his father was a resident of Canada, and returned to his father's domicil, with his mother, within a year after his birth. His mother was temporarily there—without any actual change of residence, either on her part or that of his father. It is argued that, at common law, a natural born subject was one whose birth was within the allegiance of the king. (*Bac. Ab. tit. Alien, A. Com. Dig. A. and B.* 7 *to* 18. *Bl. Com.* 336, 74.) The cases of children of ambassadors, born abroad, and of children born on English seas were considered exceptions. Chancellor Kent, in his commentaries, defines a native born citizen to be a person born within, and an alien one born out of, the jurisdiction of the United States. (2 *Kent's Com.* 37—50.) In *Lynch* v. *Clarke*, (1 *Sand. Ch. R.* 583,) the question was precisely as here, whether a child born in the city of New York of *alien* parents, during their temporary sojourn there, was a native born citizen or an alien; and the conclusion was, that being *born* within the dominion and allegiance of the United States, he was a native born citizen, whatever was the situation of the parents at the *time of the birth.* That case, if

law, would seem to be decisive of the present question. But, admitting the plaintiff to be an alien, the cases already cited show that the terms "heirs or assigns," in the 9th article of the treaty, is not to be confined to the immediate descendants, but is to be extended indefinitely till the title comes to a citizen.

But further, the plaintiff is an assignee of the first alien heir. His title accrued upon a redemption by him as judgment creditor of Hugh Munro, 2d. and by this redemption he acquired the rights of the judgment debtor directly. The title remained in the debtor, notwithstanding the sheriff's sale, until the expiration of the time for redemption, and till the execution of the sheriff's deed, which transferred the title of the debtor to the grantee. (*Evertson* v. *Sawyer*, 2 *Wend.* 507. *Catlin* v. *Jackson*, 8 *John.* 520. *Rich* v. *Baker*, 3 *Denio*, 79.) It may be added, on this point, that the plaintiff, even if not protected by the treaty of 1794, would be entitled to recover as a purchaser, and that his title would be good till office found. (*The People* v. *Conklin*, 2 *Hill*, 67. *Fairfax's dev.* v. *Hunter's lessee*, 7 *Cranch*, 649.)

The result of my conclusion therefore is, that the plaintiff is entitled to recover one undivided 13th part of the premises described in the complaint, unless defeated by the defense sought to be interposed.

I. The defendant claims that he has established a perfect title by adverse possession. The deed from Gerard Walton, as attorney for Anthony Van Dam, to Peter Gansevoort, jr., was dated in June, 1797. The grantee entered into possession under that deed, at all events of a portion of the premises conveyed, shortly after the deed and the same year of its date. The tract conveyed and claimed by Gansevoort consisted of about 1500 acres. Whether the deed was sufficiently proven or not is unimportant for the purposes of this question. It was an entry under color of title. It was a written instrument, purporting to convey the title, and sufficient within the statute on which to found and construct an adverse possession.

Neither is it important whether G. entered into possession in good faith believing he had a good title, or not. Since the decision of the court in the case of *Humbert* v. *Trinity Church*, (24 *Wend.* 587,) the former cases of *Jackson* v. *Hill*, (5 *Wend.* 532,) and *Livingston* v. *Peru Iron Co.*, (9 *Wend.* 511,) which required that ingredient, have been overruled. The section of the statute defining the nature of the occupancy which must accompany the color of title is as follows: "For the purpose of constituting an adverse possession, by any person claiming a title founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases: 1. Where it has usually been cultivated or improved; 2. Where it has been protected by a substantial enclosure; 3. Where, although not enclosed, it has been used for the supply of fuel, or fencing timber for the purposes of husbandry, or the ordinary use of the occupant; and 4. Where a *known farm*, or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved or cultivated." (2 *R. S.* 222, § 10. *Id.* 4*th ed.* 495, § 83.)

It is not pretended that the evidence brings this case within either of the first two subdivisions of this section, but the defendants counsel insists that it falls within the 3d subdivision in two of its aspects; first, that the land has been used for the supply of fuel, and for the ordinary use of the occupants. The evidence, in brief, on this branch is that the tract was known as the Gansevoort farm as early as 1800. It embraced a large quantity of timber lands, and lumber was cut, indiscriminately, on all parts of it for years, down to 1820, when the lumbering business ceased. Up to this time about 300 acres of the tract had been cleared, more than half of which lay north of the premises in question. From 1820 to 1846 about 100 acres more were cleared, and about one-third of the whole clearing was on lot No. 2, and the balance north

of it Peter Gansevoort, jr. lived in Albany during all this time In 1801, however, H. Gansevoort took charge of the premises as agent for his father, and so continued till 1812, when he and his brother took a lease of the premises. No portion of the lot has been designated as a wood or fencing timber lot by the Gansevoorts, and no part except the cleared portions has been fenced. The Gansevoorts have paid the taxes on the whole tract, and two witnesses testified, in relation to two other adjacent tracts, that it was not the custom to enclose timber lands by a fence. Firewood was cut by some of the tenants, and by H. Gansevoort to send to his mother, indiscriminately on the tract, but mostly from the part near the river, to which it could be easily transported and rafted. The question is has the land been used, not for the supply of fuel and fencing timber merely, but for the purposes of *husbandry or the ordinary use of the occupant.* This was undoubtedly the intention of the legislature. The revisers reported the section originally as follows: "Where, although not enclosed it has been used for the supply of fuel or fencing timber, for the *purposes of a farm* of which *it forms* a part." If it had been adopted in this form, there would have been but two cases, with the single limitation in both, of a use for the purposes of a farm. The legislature, however, struck out the single and inserted the double limitation, as it appears in the subdivision enacted. In the case of *The People* v. *Livingston*, (8 *Barb.* 255, 63,) the court said that "in a case where a constructive adverse possession may be shown, although it may appear that the defendant, or those under whom he claims, entered into the possession of a *great lot* containing a large number of acres, under claim of title founded upon a written instrument, and that there has been a continued occupation and possession of parts of such tract, it being divided into lots, and the lot in suit not having been usually cultivated or improved, or protected by a substantial enclosure, or used for the supply of fuel or fencing timber for the purposes of husbandry, or the ordinary use of the defendant, or those under whom he

claims, or any of his tenants, not being a portion of a known farm or single lot, partly improved, that has been left not cleared, or not enclosed according to the usual course and custom of the adjoining country, the possession of some of the lots in the tract claimed is not constructively to be deemed a possession of the lot or tract in suit." That case in many of its features resembles the present, and I think the decision there, is authority upon the question here. Have the premises in question been used for the supply of fencing or fuel timber, as defined in that case? It appears to me that the only answer to this question is in the negative. There is no proof that any fuel or fencing timber was ever taken from them.

Are they embraced within the limits of the fourth subdivision? Did the whole 1500 acres constitute a known farm, or single lot, partly improved, the portion of which left not cleared or not enclosed, being according to the usual course and custom of the adjoining country? The revisers, in their notes on this subdivision, remark, that "instead of an arbitrary rule, which the cunning might evade, and to which false witnesses might adapt their testimony," it presents the principle which governs in commercial and various other cases, of appealing to the common usage or custom. (3 *R. S.* 700, 2*d ed.*) In *Simpson* v. *Downing*, (23 *Wend.* 316, 322,) the court say, "that the ideal possession cannot be extended by a written instrument, beyond the size of the farm or lot partly occupied. The size must accord with the usage of the adjoining country. The usage or custom here spoken of is a particular one concerning the size of partly improved farms, and the quantity therein of lands not cleared or enclosed, not the custom proved as to two or three farms, of not inclosing timber lands. And see *Lane* v. *Gould*, (10 *Barb.* 254;) *Jackson* v. *Oltz*, (8 *Wend.* 441;) *Sharp* v. *Brandow*, (15 *Wend.* 597.) In the last case, Justice Nelson said, "if a party claims more than he has under actual improvement, by constructive possession, under claim of paper title, his claim cannot extend beyond a single lot." Such a pos-

session of part, claiming title to the whole, and with the usual acts of ownership over the unimproved part, as in the case of a farm occupied for agricultural purposes, is deemed sufficient; citing 1 *Cowen*, 276, 8 *Wend.* 460, 7 *id.* 62. In that case the entry was under color and claim of paper title to an undivided sixth part of the lot, yet the judge remarked, "*as the lot contained* 1500 *acres*, it is clear it could not extend beyond the actual improvements."

The defendant introduced, and read in evidence, a certified copy of the registry of a mortgage from Hugh Munro to Jacob Walton, Isaac Low and Anthony Van Dam. Also, the original book of registry of mortgages of indentures, from 1772 to Dec. 11, 1782, from which it appeared that all the mortgages registered therein were registered in the same manner and form as the one in question. Also a book of registry of mortgages from the Saratoga county clerk's office, from the year 1791 to 1805, the mortgages in which were all registered in the same form. The question is, whether this was sufficient proof of the mortgage. The colonial acts referred to by the defendant's counsel, do not provide that the *registry* of mortgages merely, such as was proved here, shall be sufficient evidence of their execution. The act of 12th Dec. 1753, (3 *R. S. App.* 10,) provides for the registering of all mortgages, but does not declare that such registry *shall be evidence*, while the acts of 16th February, 1771, and 8th March, 1773, (3 *R. S. App.* 22, 23,) *do declare* that the records of deeds, &c. may be read in evidence. Public records and official registers are evidence only of such facts as are required to be recorded in them, or which occurred in presence of the recording officers. (1 *Greenl. Ev.* § 493. 10 *Paige*, 366. 7 *Wend.* 377. 4 *Car. & Payne*, 29. 3 *Stark.* 63. 19 *Abr.* 430.) The registry purports to be a mere abstract of the mortgage, but does not profess to be a copy of it. There is no evidence of its execution by the mortgagor, except the memorandum; or that it was ever proved or acknowledged. The act of 1753 can only be regarded then, as it has ever been, a mere statute of no-

tice. (6 *Barb.* 60.) In *Den* v. *Gustis*, (7 *Halst.* 42,) a book of registry of mortgages, under an act of New Jersey, substantially like the colonial act of 1759, was offered as evidence of the mortgage, and the court rejected it, on the ground that there was no provision in it making the registry evidence; and the distinction was taken between that act and another of the same state, relative to deeds, similar to the colonial act of 1710, regulating the recording of deeds. (*See Frear* v. *Eagle Fire Ins. Co.* (*Anth. N. P.* 173.) This view disposes of the mortgage. But even if it were to be admitted as proven, it may well be doubted whether the defendant, or any one since the mortgagee, has been shown to have any interest in it. In *Jackson* v. *Bunson*, (19 *John.* 325,) the action was ejectment by mortgagor against the grantee of the mortgagee, and the court sustained the action, remarking that it had long been well settled that the mortgagee had a mere chattel interest, and the mortgagor was considered the proprietor of the freehold. This doctrine has been followed in several subsequent cases. (6 *Cowen* 147. 11 *New Hamp. R.* 274. *Ellison* v. *Davis*. *Wilson* v. *Troup*, 2 *Cow.* 195, 230.) Besides, is not the mortgage to be presumed satisfied, after such a lapse of time; the defendants showing no connection with it? (*Belmont* v. *O'Brien*, 2 *Kern.* 398.) If, however, the mortgage was considered as fully proved, and the defendant's possession under it, the question which next arises is, whether the mortgagee, having possession of the land after forfeiture, is entitled to retain his possession until his debt is paid. There are a number of cases which hold this doctrine. (10 *John.* 480. *Jackson* v. *Bowen*, 7 *Cowen*, 13. *The Same* v. *Myers*, 11 *Wend.* 533. *Van Duyne* v. *Thayre*, 14 *id.* 233. *Waring* v. *Smyth*, 2 *Barb. Ch. R.* 119. *St. John* v. *Bumpstead*, 17 *Barb.* 100. *Phyfe* v. *Riley*, 15 *Wend.* 248.) In the last case the court remark expressly that the revised statutes have not altered the law in this respect. Chancellor Walworth remarked, in *Waring* v. *Smyth*, that the only right the mortgagee has in the land since the revised statutes,

is to take possession thereof, with the assent of the mortgagor, after the debt has become due and payable, and to retain such possession till the debt is paid. Here was a possession after the forfeiture of the mortgage, a sufficient length of time to bar an entry, and if the mortgage were fully proved, the possession would perhaps be presumed to have been under legal proceedings, or with the assent of the mortgagor. (*Jackson* v. *Warford*, 7 *Wend.* 62. *Hoyt* v. *Carter*, 16 *Barb.* 212, 230.)

On the point of adverse possession, I think there was no question of fact to be submitted to the jury. It has already been shown what constitutes a constructive adverse possession, where an entry is made upon a part of the land under color of title. In this case, whether the defendant had proved enough to constitute such adverse possession, was a question not for the jury. There was no dispute about the facts: they were all admitted; and the question therefore upon these facts was one of law, for the court to determine, whether such possession came within the statute or not. (*Bowie* v. *Brahe*, 3 *Duer*, 35, 44. *Clapp* v. *Bromagham*, 9 *Cowen*, 530.)

As to the other point taken by the defendant's counsel, that the case should have been submitted to the jury upon the presumption of a conveyance, I am of opinion that it is not well taken. The cases of *Schauber* v. *Johnson*, (2 *Wend.* 12,) and of *Briggs* v. *Prosser*, (14 *id.* 227,) do not support the position of the defendant's counsel. In the former case Chancellor Walworth remarked that there were two classes of presumptions. The first was that of equitable owners, and the other was "in favor of a person who is in possession of property or in the enjoyment of some privilege or easement under claim of right, in which case, under *certain circumstances*, and after a great lapse of time, a conveyance of the land or grant of the privilege or easement will be presumed, on the principle of quieting possession." What are the "*certain circumstances*" to which the learned jurist refers? Clearly those which had been referred to and commented upon in previous

cases relating to the doctrine. The larger part of these cases are those in which the party seeking the benefit of the presumption, was shown to be the owner of the land, but lacked some formal conveyance, such as in the latter case of *Briggs* v. *Prosser*, cited by the counsel, where the party having been in possession *under a contract*, for a period of 25 years, a conveyance was presumed; and also cases of mortgagor and mortgagee, after payment of the mortgage debt; and where parties are the equitable owners and lack some formal ingredient of title. *Such "circumstances,"* accompanied with possession, demand a presumption. (1 *Cowen & Hill*, 355–371. 8 *East*, 263. 1 *Cai.* 83. 7 *T. R.* 5. 7 *Cowen*, 431. 4 *Wend.* 543. 2 *Denio*, 61.)

Presumption of conveyance also arises where a party makes out a chain of title with the exception of one or more links, which he asks to supply by proof of some "*circumstances*" of knowledge, or admissions or acts of acquiescence on the part of his adversary, making it probable that his chain of title is perfect, although he is not able to supply every link. (3 *John. Cas.* 109. 7 *Wend.* 62. 2 *Caines*, 607. 5 *Cowen*, 130. 6 *id.* 706. 2 *Wend.* 13, 357. "Length of time," say the court in *Goodtitle* v. *Duke of Chandos*, (2 *P. Wms.* 1065,) "is nothing. The presumption must arise from some *facts or circumstances arising within that time.*"

Apply the rules and limitations presented in the foregoing cases and many others which might be cited, and this case will be found entirely destitute of all the "facts and circumstances" required—and will present no questions for the jury to pass upon. It is purely a question of constructive adverse possession founded upon an instrument in writing, and an actual possession of a small portion of the land conveyed.

It follows from these views that the plaintiff is entitled to recover one undivided thirteenth share of the premises in question; and for that I think judgment must be entered.

Ordered accordingly.

[Montgomery General Term, January 5, 1858. *C. L. Allen, Paige* and *James*, Justices.]

HARDER *vs.* HARDER.

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Objections on the ground of irregularities in practice, if intended to be urged, must be brought to the notice of the adverse party, to the end that he may have an opportunity to answer the same.

In disposing of a motion to set aside an inquisition taken in a case of waste, the court will not consider the objections, taken on the argument, that a writ of inquiry is not a proper remedy in a case of that kind, and that the writ issued was not in proper form; where those objections were not taken in the moving papers.

In an action under the code, brought by a remainderman against the tenant for life, in lieu of the former action of waste, for an intentional and malicious injury to the estate and inheritance of the plaintiff, the plaintiff alleging that such injury equals the value of the defendant's estate in the premises, and praying not only for damages, but for a forfeiture of the defendant's estate, and his eviction from the premises, upon the execution of a writ of inquiry, the amount of damages is a leading subject of inquiry. Yet, although the defendant has suffered a default, the sheriff's jury are also to inquire of the waste done, and in so doing, to designate the place wasted.

In determining the amount of the plaintiff's damages, they are to inquire how far the acts of the defendant have injured the plaintiff's estate and inheritance. And in doing so, they are not limited to the value or market price of the wood and timber actually cut and removed. They may, and should, also consider the effect which the cutting off of the wood and timber has had upon the place alleged to be wasted.

The damages to the place wasted are not, necessarily and exclusively, the value of the wood and timber removed, but the solid and permanent injury to the inheritance; the tenant for life having a right to cut wood and timber for necessary repairs, and for fuel, and to clear portions of the land for cultivation.

If, in such an action, the plaintiff fails to prove that the injury to his estate is equal to the value of the defendant's estate, he cannot have a judgment to recover the place wasted, and treble damages. An allegation to that effect, in the complaint, will not be admitted by the default of the defendant.

THE plaintiff's complaint set forth that Dennis Harder deceased was, in his lifetime, seised in fee of a farm in Chatham, in the county of Columbia; that at his death, in 1843, he devised the use, benefit and occupancy thereof to the defendant during his life, and afterwards to the plaintiff in fee; that the defendant took possession thereof soon after the testator's death, and had ever since occupied the same, and enjoyed the rents, issues and profits thereof; that the defend-

ant intentionally, and with design to injure the estate and inheritance of the plaintiff in said farm, did, between 1845 and 1854, sell, cut down, and prostrate wood, timber and trees, of the value of $1500, standing and growing upon about twenty acres thereof, (describing the same,) and thereby greatly injured the estate and inheritance of the plaintiff in the same, and to an amount equal to the value of the defendant's estate in the premises. A second count alleged a similar injury to another tract of about twelve acres in another part of the farm. The plaintiff demanded judgment for the injuries aforesaid, damages to the sum of $2700, and that the defendant forfeit his estate and be evicted from the several parcels of land before mentioned, together with costs of the action. The defendant put in a demurrer to the complaint which, on argument, was overruled; and not having availed himself of the leave granted to withdraw the demurrer, and answer, the plaintiff took judgment by default, and on notice to the defendant, obtained from this court at special term, an order "that a writ of inquiry issue to the sheriff of Columbia, commanding him to go to the places wasted, specified or mentioned in the plaintiff's complaint, and by the verdict of a jury to inquire of the waste done, and of the damages occasioned thereby." The defendant's attorneys allege that they understood the plaintiff to ask for the usual order common to all cases of assessment by a sheriff's jury, and that no draft order was shown them nor copy served until after the motion in this case was actually made. A writ of inquiry was issued in conformity to the order, under which the sheriff, with the aid of a sheriff's jury, proceeded to take testimony and make inquisition in the premises. On the taking of this inquisition the defendant appeared by counsel and made various objections to questions put by the plaintiff's counsel, and proposed various questions on his part, which were overruled by the sheriff. The defendant objected to the plaintiff's proof of the amount of wood cut; of the value of the trees when standing on the ground; of the increased price or expense of taking the wood to market

from the lot instead of the roadside where it was piled; of the number of saw-logs cut from the lot; of the difference in quantity of wood to the acre between the east and the west lots. The defendant's objections were overruled by the sheriff, and in some instances exceptions were taken. The defendant propounded to the witnesses these questions: Whether the land upon which the wood grew, was not worth more with the wood cut off, than with the wood standing; what it was worth to clear off the land after the wood was off; what the wood on the lot would have been worth standing, until the time of examination; whether there would have been a less quantity of wood on the lot if left uncut till then; whether the wood would not have been worth less per cord if left standing until then; whether the lot was then fenced; what it was worth to fence the lot; what was the relative value of the farm with this wood cut off and standing; whether the farm had not been improved in value by the cutting off this wood and cultivating the land; how many acres of wood were left standing upon the farm; whether the defendant had not made considerable fence on the farm; whether he had repaired and shingled the barn; whether the defendant did not use the chestnut timber for fencing. These several questions were all overruled by the sheriff, on the plaintiff's objection thereto, and the defendant in some instances excepted. The defendant offered to show, by the plaintiff's witnesses, that there were thirty acres of wood left standing on the farm, and that this was a sufficient quantity for a farm of the size in question. The plaintiff objected to the evidence, and the sheriff excluded the same. The sheriff's jury assessed the plaintiff's single damages, occasioned by the waste done, at $800. The defendant also alleged, on information and belief, that the plaintiff's father, on his behalf, procured and furnished to the jurors their dinners and other entertainment during the taking of the inquisition. This was peremptorily denied on the part of the plaintiff. The plaintiff now moved, at special term, for leave to enter judgment, that the plaintiff recover the places wasted,

described in the complaint, and treble the damages found by the jury of inquiry, besides costs of the action. The defendant opposed the applications, and made upon affidavits a counter-motion "that the inquisition made and returned by the sheriff of Columbia county be set aside, and for such other or further order as to the court may appear proper." These affidavits set forth simply the proceedings on taking the inquisition and the fact of entertainment furnished to the jurors.

A. Bingham, for the defendant.

A. Hough, for the plaintiff.

HOGEBOOM, J. In disposing of the motion to set aside the inquisition, I do not propose to consider the objection, taken on the argument, that a writ of inquiry in a case of this kind was not a proper remedy, nor that it was not in proper form. These objections are not taken in the moving papers, either in the affidavits or notice of motion, and I regard it as a very salutary as well as a well established rule, that irregularities complained of must be brought to the notice of the adverse party, to the end that he may have an opportunity to answer the same. This is indeed one of the standing rules of the court. (*Rule* 25. *Roche* v. *Ward*, 7 *How. Pr. Rep.* 416. *Mann* v. *Brooks*, *Id.* 457. *Baxter* v. *Arnold*, 9 *id.* 445. *Bowman* v. *Sheldon*, 5 *Sandf.* 660.)

Nor do I propose to consider the question whether this application for relief on the merits is made in precisely the right shape in other respects. A special non-enumerated term seems scarcely the proper place for disposing of questions of testimony affecting the merits of the action; nor does it seem to me that the matter should be presented on conflicting affidavits, throwing upon the court the necessity of deciding what proceedings on the merits in fact took place before the sheriff's jury, as well as deciding upon the legal propriety of them. The case is, or should be, I think, a calendar cause, brought up

on facts previously settled. But as no objection was taken on this ground, and the practice does not appear to be very well established, and the motion was in fact made at a special term proper where the cause might have been and perhaps was upon the calendar, I shall examine the case on its merits.

The technical action of *waste* is abolished, and an action according to the forms of pleading provided for by the code substituted in lieu thereof. (*Code*, § 450.) This substituted action, I think, the plaintiff intended to institute. The gist of the complaint is for intentional and malicious injury to the estate and inheritance of the plaintiff, and the allegation is, of great injury to the plaintiff's estate and inheritance, and that such injury equalled the value of the defendant's estate in the premises; and the judgment sought is not simply damages, but a forfeiture of the defendant's estate, and his eviction from the premises. The writ of inquiry commands the sheriff to go to the places *wasted* and inquire of the *waste* done, and of the damages occasioned thereby. The plaintiff's notice of motion upon the inquisition returned is for judgment that the plaintiff recover the places wasted and treble damages, besides the costs of the action. The pleader has evidently sought to bring the case within the operation of sections 450, 451 and 452 of the code, and to obtain the benefit of the stringent remedies which were heretofore authorized in an action of waste. (2 *R. S.* 334, 335.)

It becomes therefore a very appropriate inquiry in ascertaining the damages which the plaintiff has sustained, what amount of *waste* has been committed; for the jury are "to inquire of the *waste done*," and of course of its nature and extent, "and of the damages *occasioned thereby*." The *amount* of damages is a leading if not the exclusive subject of inquiry, although I think, notwithstanding the defendant has suffered a default, the sheriff's jury are also to inquire of the waste done, and in so doing to designate the place wasted. Now in determining the plaintiff's damages, they must necessarily inquire how far the acts of the defendant have injured

the plaintiff's estate and inheritance; for such are the allegations in the complaint, and such is the proper inquiry in ascertaining what is waste. (*Kidd* v. *Denniston*, 6 *Barb.* 9.) In prosecuting that inquiry, they are not limited to the value or market price of the wood and timber actually cut and removed. That may be, and probably is, a legitimate subject for the jury to consider; but I think they may and should also consider the effect which the cutting off of the wood and timber has had upon the place alleged to be wasted, and perhaps upon the residue of the farm. For, the relief which the plaintiff seeks is, not only the forfeiture of the defendant's estate, and his eviction from the premises, but *treble* the damages occasioned by the waste done. Occasioned to what? to whom? Occasioned to the plaintiff as the owner of the entire premises; occasioned by the defendant as the occupant of the entire premises and having a right to the *use*, *benefit* and occupancy of the same during his life. The *damages* to the *place wasted* are not necessarily and exclusively the value of the wood and timber removed, but the solid and permanent injury to the inheritance. It is very clear that the owner of the life estate may cut wood and timber for the necessary reparation of the fences, buildings and erections upon the farm, and for fuel; and it is held that he may clear so much of the land from wood as shall be necessary or judicious, in the exercise of good husbandry, to adapt it for cultivation and other agricultural purposes. (2 *R. S.* 336, 7. *Kidd* v. *Dennison*, 6 *Barb.* 9. *Livingston* v. *Reynolds*, 26 *Wend.* 115. 2 *Hill*, 157.)

If this view of the case be correct, then several of the questions propounded by the defendant's counsel were improperly overruled; especially such as related to the comparative value of the land with the wood on, or the wood off; whether the wood would not have depreciated in value if it had been permitted to stand; how many acres of wood land were left standing on the farm; whether the defendant had not devoted a considerable quantity of the wood or timber to the reparation of the buildings and fences on the farm. These and other

questions seem to me to have been improperly overruled, because they were proper and important subjects for the consideration of the jury in fixing their estimate of damages. It is not essential to decide that they were vital or conclusive: they were not so—but they were legitimate and material. The plaintiff's counsel seems to have tried the case in the same way as if the jury were assembled simply to assess the value of the wood and timber cut and removed. The case is not one of that character. The errors above referred to may be fairly concluded to have had a material bearing on the final result. And therefore, without determining whether the same strict rules ought to apply before a sheriff's jury as on an ordinary trial, in regard to the effect of the rejection of competent testimony, the inquisition should be set aside, to the end that these errors may be avoided on a rehearing.

This being so, the plaintiff's motion for judgment to recover the place wasted, and treble damages, ought not to be granted. It is unnecessary, therefore, to discuss in detail the defendant's objections to the confirmation of the inquisition and judgment thereon. It may not be improper, perhaps, to say, that if there were no other objections to such a judgment, the omission to establish that the injury to the plaintiff's estate is equal to the value of the defendant's estate, or unoccupied term, seems to present an insuperable objection to granting the judgment asked for. (*Code*, § 452.) I do not think this allegation in the plaintiff's complaint is admitted by the default.

The motion to set aside the inquisition must be granted; the motion for judgment must be denied; each with costs to abide the event.

[Albany Special Term, January 11, 1858. *Hogeboom*, Justice.]

26 416
41 54
23h 155
34a 203
Devise
170 N. Y. 391

VANDEMARK *vs.* VANDEMARK.

A devisee or legatee may appeal from an order of the surrogate, admitting a will to probate, notwithstanding he was one of the persons who presented the will to the surrogate, and petitioned for its probate.

The sale and conveyance, by a testator, subsequent to the execution of his will, of the principal part of a farm devised therein, will operate as a revocation, not of the whole will, but only of the devise, to the extent that the testator has divested himself of the property devised.

The proceeds of the land thus sold, if in the hands of the testator at the time of his death, will pass, with the residue of his personal estate, to the persons to whom that estate was bequeathed.

THIS was an appeal from an order of the surrogate of Ulster county, admitting to probate the last will and testament of William Vandemark, deceased. The will bears date the eleventh day of June, 1851, and was executed in due form of law. By the will, the testator devised to his son, James Vandemark, the appellant, a part of a farm called the Embree place, worth, as appears from the testimony in the case, about $2000, and charged it with the payment of $100 each to his two daughters, Maria and Rebecca. Some two years after the will was executed, the testator sold and conveyed the whole of the premises thus devised, with the exception of about 12 or 15 acres, worth about fifteen or twenty dollars per acre.

The testator also devised to his son, Charles C. Vandemark, the respondent, his homestead farm, worth, it appears, from $2500 to $3000, and charged it with the payment of $100 to his daughter Cornelia. He also devised to another son, John W. Vandemark, another farm in Marbletown, worth about $2500, and a small piece of land besides, containing about twelve acres. He charged this devise with the payment of $100 to his son, Martin Vandemark. He devised to his three daughters, Maria, Rebecca and Cornelia, a wood lot in Marbletown Commons. This lot he subsequently sold and conveyed for $300. Another piece of land, called the Chambers lot, he divided into three equal parts, and devised one part to

each of his sons, Charles, John and Martin. The part devised to Charles was subsequently sold and conveyed by the testator. The testator gave his personal property to his sons, Charles and John, to be equally divided between them.

The testator also purchased, on the 12th of January, 1852, a lot containing 27 acres, for which he paid $810, and which he owned at the time of his death. He died on the 3d day of November, 1855, leaving a widow and six children surviving, and also a grandson, the son of his deceased daughter Maria. The will was presented for probate by his sons, James Vandemark and Charles C. Vandemark, the executors named therein. Rebecca, the wife of Daniel Wager, Cornelia, the wife of William H. Keator, and Martin Vandemark, opposed the probate of the will, chiefly on the ground of *revocation*. The surrogate, after hearing the proofs and allegations of the parties, made an order, on the 5th of February, 1856, admitting the will to probate. From this order, James Vandemark appealed to this court.

E. Cooke, for the appellant.

J. K. Porter, for the respondent.

By the Court, HARRIS, J. The appellant, James Vandemark, presented the will to the surrogate, and was a petitioner for its probate. It is insisted that he cannot appeal from the order made upon his own application. But this objection is untenable. The statute provides that, after any will has been proved before the surrogate, any devisee or legatee named therein, or any heir or next of kin to the testator, may, within three months thereafter, appeal from the decision. (2 *R. S.* 66, § 55.) This provision is, of course, sufficiently broad to authorize this appeal, even though the appellant was a petitioner for probate.

A feeble attempt was made, upon the hearing before the surrogate, to show the incapacity of the testator, but the

ground upon which the appellant relies to reverse the decision of the surrogate is, the changes which were made in the property of the testator between the time of making the will and his death. It is undoubtedly true, that by the sale of the Embree farm, which had been devised to the appellant, he has been nearly disinherited. The interests of other parties have been affected, some for the better and some for the worse, but none so seriously as those of the appellant. The daughters of the testator are deprived, for the most part, of what he intended, when he made his will, they should receive. But they are partially, perhaps fully, compensated, by being made heirs, with their brothers, of the piece of land purchased after the will was executed. The principal hardship falls upon the appellant. The most of the land devised to him was sold, and the proceeds, being personal property, have probably gone to increase the amount to be received by his brothers, Charles and John, to whom the personal estate was bequeathed.

But, however willing we might be to see the will annulled, and what might seem to us a more equitable distribution of the property take place, it is not the province of this court to interfere. The will was executed in due form of law, and by a competent testator. I am not aware that a mere alteration of the estate has ever been allowed to work a revocation of the whole will. The doctrine of implied revocation had, indeed, been carried so far, in respect to specific devises, that the legislature, in the revision of our statutes in 1830, thought fit to interpose, and to define the cases in which it should be allowed to operate. (2 *R. S.* 64, §§ 46 *to* 48.) Now, a change in the property of the testator, subsequent to the execution of his will, operates as a revocation of the devises in the will, just so far as the alteration in the property has had the effect to place it beyond the operation of the provisions of the will, and no further. In *Adams* v. *Winne*, (7 *Paige*, 97,) a testator had devised certain portions of his real estate to his two sons, and certain other portions to his two daughters. Sub-

sequently, he sold a part of the real estate devised to his daughters, and received for a part of the consideration, a bond secured by a mortgage upon the same premises. It was held that the sale and conveyance of the lot operated, *pro tanto*, as a revocation of the devise. The will, itself, took effect, and the bond and mortgage, which had been substituted for the lot devised, passed to the children of the testator under a residuary provision. (*See also Beck* v. *McGillis*, 9 *Barb.* 52.) So, in this case, the sale and conveyance of the principal part of the farm devised to the appellant operated as a revocation, not of the whole will, but of the devise contained in the will, to the extent that the testator had divested himself of the property devised. The proceeds of the land thus sold, if in the hands of the testator at the time of his death, passed, with the residue of his personal estate, to those children to whom that estate had been bequeathed. There was nothing in these changes which could have the effect to revoke, or in any way invalidate the will itself. The order of the surrogate, therefore, was right, and should be affirmed with costs.

[Albany General Term, May 4 1857. *W. B. Wright, Harris* and *Gould*, Justices.]

Simmons *vs.* McElwain.

26 419
30 424
9b 515
19b 122
30b 86
26a 329

Although a deed from a husband to his wife is void in law, yet such a grant will be upheld in equity, when it is necessary to prevent injustice.

Where the wife, in good faith, and for a valuable consideration paid out of her separate estate, has purchased land which is conveyed to her by her husband, she obtains an equitable right to it, which a court of equity will recognize and protect.

Where a married woman, having a separate estate, proceeds to make improvements upon it, and for that purpose employs mechanics to furnish materials and erect a dwelling-house, the debt thus contracted is her debt, and not that of the husband, and he cannot be compelled to pay it.

Simmons *v.* McElwain.

Nor will a conveyance of the property, by the wife, to her husband, carry with it an obligation to pay her debts. The property itself may be charged, in his hands, but there is no personal liability, on his part.

THIS was an appeal from a judgment on the report of a referee. The action was brought to recover three several demands: one in favor of George Lawrence, amounting to $264.50, for carpenter's work in building a house; another in favor of Wolford and Stephenson, amounting to $297.56, for mason's work on the same house, and the other in favor of Thomas W. Blatchford, amounting to $58, for a physician's bill. All these demands had been assigned to the plaintiff before this action was brought. After issue had been joined, and before trial, the defendant offered to allow the plaintiff to take judgment against him for $62, which offer was not accepted. The cause was referred to Isaac Edwards, Esq., as sole referee.

The facts established upon the trial are as follows: the defendant was married to Janette Cook, in May, 1850. At the time of the marriage, the wife had a separate estate in the hands of her brother, Samuel G. H. Cook, to the amount of about $600. Soon after the marriage, the defendant purchased about eight acres and a half of land near the village of Cohoes, and, on the 20th of June, 1851, he conveyed directly to his wife, by deed, two acres of this land, for which he received from her brother $400. In September following, Mrs. McElwain entered into a written contract with Lawrence, by which, for certain stipulated prices, he agreed to furnish materials and do the carpenter's work in building a house upon the land conveyed to her by her husband. About the time this contract was made, Mrs. Janette C. Huntington, with whom Mrs. McElwain had resided before her marriage, placed in the hands of her brother, Mr. Cook, $1600, subject to the order of Mrs. McElwain, and to be paid out for the work done and materials furnished in building the house. The payment of this money was secured to Mrs. Huntington by a mortgage upon the premises, executed by the defendant and his wife.

The work performed by Lawrence, and the materials furnished by him under his contract, amounted to $796.50, of which $535 was paid by Mrs. McElwain, or her brother for her, as the work progressed, leaving a balance of $261.50 unpaid.

Wolford and Stephenson also performed the mason work in building the house, under a contract made with Mrs. McElwain, she at the time informing them that her brother was her banker and that she had a fund of $2500 to pay for building the house. Their work amounted to $1114.94, the whole amount of which was paid, except $297.56. The referee also found that after the work was done, the defendant proposed both to Lawrence and to Wolford and Stephenson, to assign a certain debt due him for the purpose of paying these balances, but no such arrangement was ever made. On the 11th of June, 1852, Mrs. McElwain conveyed the premises, by deed, to the defendant, and, being in ill health, left home on the same day for the sea side where she remained during the summer. In September she returned to Troy, where she remained until February following, when she died. The defendant has continued in the possession of the house since its completion. Mrs. McElwain left a will whereby she devised and bequeathed all her estate to her brother.

The bill for medical services, assigned to the plaintiff, accrued during the illness of Mrs. McElwain, in Troy. The referee decided that the defendant was liable for this bill, but not for the balances due to Lawrence and Wolford and Stephenson. The report was in favor of the plaintiff for $67.14. This amount not being more favorable to the plaintiff than the offer of the defendant, the latter became entitled to costs subsequent to the offer. The costs being adjusted between the parties, judgment was rendered for the plaintiff for $59.22. From this judgment the plaintiff appealed to the general term.

M. I. Townsend, for the plaintiff.

J. H. Reynolds, for the defendant.

By the Court, HARRIS, J. It is true that the deed from the defendant to his wife, was void in law, for a husband cannot, during coverture, make a grant or conveyance to his wife. But such a grant will be upheld in equity, when it is necessary to prevent injustice. (*See Shepard* v. *Shepard*, 7 *John. Ch.* 57, *and cases there cited;* 2 *Kent's Com.* 156.) In this case, the wife, in good faith, and for a valuable consideration, paid out of her separate estate, purchased the land conveyed to her. She thus obtained an equitable right to it, which a court of equity will recognize and protect.

Having thus acquired an equitable title to the land, she proceeded to make improvements upon it, and, for this purpose, employed mechanics to erect a house. The contracts she made with them were for the benefit of her own separate estate. In undertaking to furnish materials and perform the work, they were to look to Mrs. McElwain, and not the defendant, for compensation. The debt thus contracted was her debt, and not that of the defendant. It was for the benefit of her estate, and not his. It might be charged upon her separate estate. The husband incurred no personal liability. (*See Stammers* v. *Macomb*, 2 *Wend.* 454; *Dickerman* v. *Abrahams*, 21 *Barb.* 551.)

So far as the case depends upon questions of fact, these have been disposed of by the referee. His decisions are supported by the testimony. Mrs. McElwain not only contracted for the work, but it was done upon the credit of her separate estate. Nor is there any thing in the case which required the referee to find that the defendant ever assumed the payment of her debt. He proposed to assign certain demands in order to provide the means of payment, but this proposition was not accepted, and no obligation to pay the debt can be inferred from it.

Nor did the re-conveyance of the property by Mrs. McElwain to her husband, carry with it an obligation to pay her debts. The property itself might be charged in his hands, but there was nothing in the transaction which could create a

personal liability. Upon the whole, I think the case has been correctly decided by the referee. The judgment should therefore be affirmed. The costs to which the defendant will be entitled on this appeal will probably exceed the amount of the judgment recovered by the plaintiff. If so, these costs should be applied to satisfy that amount, and the defendant should have judgment only for the excess.

[Albany General Term, May 4, 1857. *W. B. Wright, Harris* and *Gould*, Justices.]

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26 423
1L 170
116a 164

Gardner *vs.* The Mayor &c. of the City of Troy.

Where a municipal corporation had undertaken, by means of an assessment and sale, to create in themselves a certain term or interest in land, and, assuming that they had succeeded in doing so, they sold such term or interest to the plaintiff, and it afterwards turned out that, owing to a defect in the proceedings, no such term or interest was ever created; *Held* that an action would lie, in favor of the plaintiff, to recover back the consideration money paid by him; not on the ground of a failure of title, but because the thing he purchased never had an existence.

Under such circumstances, the parties being mutually mistaken as to the facts, although there be no fraud, the contract may be rescinded, on the ground hat the subject of the contract had no existence.

THIS was an appeal from a judgment on the report of a referee. The facts, as they appear in the report of the referee, are as follows: The common council of Troy had instituted proceedings for opening a section of North Fourth street, in that city, and made an assessment upon certain lands, for the expenses of the proceedings. Among other lands assessed, was the following: "Stephen Ross, lot E. and part of lot D., 500 feet," assessed to pay $520. The assessment was returned and confirmed by the common council, on the 28th of July, 1836. The assessment not having been paid, the premises were sold on the 4th day of February, 1842, and bid off in the name of James A. Zander, the

city commissioner, for the benefit of the defendants. A declaration of sale was executed, in which the proceedings were recited, and it was stated that the premises, described in the assessment as being lot E., and part of lot D., 500 feet, assessed to Stephen Ross, had been purchased by James A. Zander for the term of 1800 years. On the 31st of October, 1846, Zander, at the request of the city attorney, released to the plaintiff all his right and title to the lots conveyed to him by the declaration of sale. There were no covenants of title in the deed. Zander had no interest in the sale. He was, in fact, ignorant that the premises had been struck off in his name, until he was applied to for the purpose of having the release executed. The plaintiff paid to the defendants $409.58, as the consideration of the release.

This action was brought to recover back the money paid to the defendants, on the ground that the assessment and subsequent proceedings, in respect to the premises in question, were void. The referee decided that the assessment was void by reason of the uncertainty and vagueness of the description of the premises, and that the sale was also void. The referee also decided that although the assessment and sale were void, the plaintiff could not recover in this action, there being no proof of any fraud in the sale by the defendant to the plaintiff, nor any covenant for title, either in the declaration of sale or the release of Zander. Judgment was accordingly rendered in favor of the defendant. From this judgment the plaintiff appealed.

J. H. Reynolds and *D. Gardner*, for the plaintiff

G. Stow, for the defendants.

By the Court, HARRIS, J. The plaintiff agreed to purchase of the defendants the term which they believed they had in the premises described in the declaration of sale, by virtue of the assessment and sale. For this term he paid the stipulated price, believing that he should thereby acquire

the interest mentioned in the declaration of sale. The parties were mutually mistaken. The defendants had no interest in the premises to sell, and, of course, the plaintiff acquired nothing by his purchase. There was no fraud in the case. It was a mere mistake of fact. The assessment was void, and of course the defendants had no authority to sell. They did not know this, and were therefore not chargeable with fraud. The plaintiff was equally ignorant when he purchased. A contract made under such circumstances may be rescinded, on the ground that the subject of the contract had no existence at the time the contract was made. There was, in fact, no such term or interest as that described in the declaration of sale and the release to the defendants.

The case cannot be distinguished, in principle, from that of *Martin* v. *McCormick*, (4 *Selden*, 331.) In the latter case, Martin was the owner of a house and lot in the city of New York. The property was sold, by order of the corporation of New York, for taxes chargeable upon it, and upon the sale the defendant became the purchaser. The plaintiff made an attempt to redeem the property, but was informed by the comptroller, and also by the defendant, that his redemption was too late. His money was accordingly refunded to him, and he entered into a negotiation with the purchaser, and finally took from him a conveyance of his term, and paid him therefor $1800. At the time of the transaction, both parties believed that the time for redemption had expired, but it was subsequently ascertained that when Martin offered to redeem, the title of the purchaser had not become absolute. Under these circumstances, he brought his action to recover back his money, on the ground that it had been paid under a mistake of fact. The action was sustained. The court say, "the term which was the subject of the contract, contrary to the supposition of both parties, had no existence, and in all that class of cases where there is mutual error, as to the existence of the subject matter of the contract, a rescission may be had."

A still stronger case is found in *Hitchcock* v. *Giddings*, (4 *Price*, 135.) The defendant, claiming to be the owner of a remainder in fee in certain real estate, had sold to the plaintiff a moiety for £5000, for which he had taken his bond. The sale had originated with the plaintiff himself, who wished to purchase the whole of the defendant's interest, but he had refused to sell more than half. The plaintiff, at the time he purchased, was apprised of the possibility that the defendant's interest might have been extinguished by a common recovery suffered by the owner of the previous estate, but he insisted on making the purchase. After the transaction was completed, it was discovered that such a recovery had been suffered, and that the estate of the defendant had thereby been destroyed. The plaintiff brought his action to have his bond canceled, and the money he had paid refunded, upon the ground that, at the time of the purchase, the defendant had nothing to sell. Richards, Ch. Baron, before whom the case was brought for decision, said: "A contingency may certainly be sold on a speculation, but not such as was sold here. There was not even a contingency sold here. It was not selling an interest subject to a chance, for the defendant had no interest at all to which a chance could attach." The plaintiff had a decree that his bond be canceled and the money he had paid refunded.

It is true that in this case the declaration of sale furnished, upon its face, the evidence that the defendants, at the time they sold to the plaintiff, had no interest in the land. The description was such as to show that the assessment was illegal. But I am unable to see how this fact can avail the defendants as a ground of defense, any more than the fact that, in *Hitchcock* v. *Giddings*, the plaintiff, at the time of making his purchase, was apprised of the possibility that legal proceedings might already have been had, which would entirely destroy the title he was purchasing. In both cases, the parties were alike ignorant of the fact that the vendor had no title. And yet, in both cases, the

fact existed, and might have been discovered—in the one case, by examining the proceedings for the recovery, and in the other, by examining the proceedings upon the assessment. The foundation of each action is still the same. It is, that the defendants undertook to sell something, when really they had nothing to sell. The thing intended to be sold had no existence, and where that is the case, there can be no contract of sale. (*See* 2 *Kent's Com.* 468; 1 *Story's Eq. Jur.* §§ 142, 143.)

Bonsteel v. *Vanderbilt*, (21 *Barb.* 26,) was decided upon the same principle. Vanderbilt had sold to Bonsteel a ticket, giving him the right to be carried from the Isthmus of Panama to San Francisco, on the steamship North America, upon her next passage. At the time of the sale, that vessel had been lost, but both parties were ignorant of the fact. Under these circumstances, it was held that the plaintiff might recover back his money, on the ground of an entire failure of the consideration for the purchase.

The same rule was applied in the case of *The Canal Bank* v. *The Bank of Albany*, (1 *Hill*, 287.) A draft, drawn by the Montgomery County Bank upon the Canal Bank, payable to the order of one Bentley, had been abstracted from the post office and put in circulation with the forged indorsement of the payee. It came into the hands of the Bank of Albany for collection. That Bank presented it to the Canal Bank and received payment. The forgery having been discovered, the Canal Bank brought its action to recover back the money. It was held that the forgery being unknown to both parties, the money had been paid by a mutual mistake of facts, in respect to which the parties were alike bound to inquire, and might be recovered back. Cowen, J. said: "The defendants have obtained the plaintiffs' money without consideration—not as a gift, but under a mistake. For the very reason that the parties are equally innocent, the plaintiff's have the right to recover." (*See Allen* v. *Hammond*, 11 *Peters*, 63.)

I cannot see why the case under consideration does not fall

within the principle of these cases. The defendants claimed that they had acquired a lien upon the premises mentioned in the declaration. They claimed to have acquired a title to the premises, for a term of years, by the enforcement of their lien. They produced an instrument, executed by themselves, purporting to convey such a term. Relying upon this, and believing that the defendants were the owners of the term specified in their declaration, the plaintiff became the purchaser and received a transfer of the declaration of sale. The defendants intended to sell, and the plaintiff intended to purchase, an interest in the land, which in fact did not exist. It now appears that the parties were equally mistaken. The assessment and sale were invalid, and the defendants had no interest at all in the premises. The plaintiff purchased, and paid his money, under the mistaken belief that he was acquiring thereby a valid interest in the land. The parties being thus mistaken in relation to the very existence of the thing, in respect to which they contracted, "the business," says Fonblanque, "is null in itself, by the general rules of contracting," and the consideration should be refunded. (*Fonb. Eq. 4th Am. ed.* 109.)

I am aware of the doctrine that, upon the sale of land, the purchaser must, upon failure of title, look to his covenants, and, if he has not had the precaution to protect himself in this way, he is without remedy. But I do not regard this as a case of the failure of title. It is rather the failure of the subject matter of the sale. The defendants had undertaken, by means of an assignment and sale, to create in themselves a certain term or intefest in certain land. Assuming that they had succeeded in doing this, they undertook to sell such term or interest to the plaintiff. It now turns out that no such term or interest was ever created. The plaintiff complains, not that his title has failed, but that the thing he purchased never had an existence. In *Martin* v. *McCormick*, the defendant thought he had acquired an absolute title to the premises for one hundred years, and this term he undertook to sell. It turned out that there was no such term. It was

regarded by the court of appeals, not as a failure of title, but as a mistake, as to the existence of the subject matter of the contract. In *Hitchcock* v. *Giddings*, the subject of the sale was a remainder in fee, which, at the time of the contract, did not exist. It was treated by the court, not as a failure of title, but as a mutual misapprehension of the parties, in relation to the thing which was the basis of their contract. So, in this case, the parties dealt with each other upon the assumption that a term or estate, in the premises mentioned in the declaration of sale, had been created and was then in existence. This was a mistake. There never was such a term. The plaintiff failed to get what he had bargained for: not for any defect of title, but for want of the thing itself. It did not exist. Under such circumstances, the defendants, although they executed no covenant of indemnity, are not entitled to retain the money they received of the plaintiff as the consideration of his purchase.

The judgment must therefore be reversed, and a new trial granted, with costs to abide the event.

[Albany General Term, May 4, 1857. *W. B. Wright*, *Harris* and *Gould*, Justices.]

In the matter of the application of D. D. Conover *vs.* Charles Devlin.

Where proceedings were commenced before a judge, to compel the delivery of books and papers by a public officer, to his successor, and the judge determined that the applicant was entitled to the relief asked for, and made an order to that effect, after which a common law *certiorari* was issued, to remove the proceedings into the supreme court; *Held* that upon the service of the *certiorari* upon the judge, the proceedings before him were suspended; and that it would therefore be improper for him to issue the warrants to enforce his order.

Conover *v.* Devlin.

THIS was an application for warrants to enforce an order previously made, for the delivery to Mr. Conover, by Devlin, of the books and papers appertaining to the office of street commissioner for the city of New York.

PEABODY, J. Proceedings having been instituted before me, under 1 R. S. p. 125, § 56, to compel Mr. Devlin to deliver to Mr. Conover, the books and papers pertaining to the office of street commissioner of the city of New York, on the ground that the applicant was successor to the office to which they appertain, and the parties having been heard from day to day until the 8th day of July, 1857, and my decision having been announced on that day, that the applicant was entitled to the relief asked, an order to that effect was accordingly made, reduced to writing, and signed by me on the 10th day of said July. That order was served on the respondent, and delivery of the papers in compliance with it demanded, which was refused. This refusal was followed by an application for the warrants contemplated by the act, to which, by my decision embodied in the order I had determined, he was entitled. Pending this application, and while a discussion respecting the effect of an injunction then in force, restraining the applicant from taking into his possession the books and papers was in progress, a common law writ of *certiorari* from the supreme court was served on me, commanding me to certify to that court my proceedings in the premises. The injunction has since been dissolved, and I am now asked to issue the warrants notwithstanding the *certiorari*.

The fact that this writ from its operation suspends the power of the officer to whom it is addressed is not denied by the applicant, but on the contrary it is admitted, as a general proposition. But that such is not the effect in this particular case is insisted on several grounds—some of which seem to arrange themselves under the following heads:

1. It is said that this proceeding, in its nature, being summary and intended to confer present possession merely, not to

determine the ultimate rights of the parties, is an exception to the general rule, and is not suspended by the operation of this writ. And there is much of good sense in the suggestion that such a proceeding should not be liable to be suspended in this manner. It does not determine the ultimate rights of the parties, but leaves them to be determined in a more grave and formal proceeding. They depend on the right to the office, and for ascertaining that, ample provision was made before. The ancient prerogative writ of *quo warranto* gave contesting claimants a mode of determining controversies respecting office, conclusive in its nature on all the parties interested. In a proceeding by that writ in its day, as since in the action of the same name, the sovereign was plaintiff, while the person asserting his rights to the office, if there were such a claimant, was made a party incidentally, under the title of relator, and in fact was and is practically plaintiff, so far as his own rights are concerned; and the defendant, who was called on by the proceeding to show by what authority he held the office, if unable to show sufficient warrant in law, was, in obedience to the rights of the plaintiff, (and the *quasi* plaintiff, if he was deemed entitled,) ousted. The state was thus freed from the evil of an unlawful exercise of its franchise by an intruder, and a vacancy was made into which the *quasi* plaintiff or relator was inducted, if his title was approved: and if not, the office remained vacant, and ready for the occupation of the person who should be duly selected and qualified to fill it. The right to the office being thus determined, the right to the books and papers appertaining to it followed it as a necessary consequence, and thus in a grave and dignified manner the rights of the parties were ascertained and declared, and afterwards by adequate process enforced.

This proceeding, however, was not thought sufficiently speedy to answer all purposes, and accordingly, to supply immediate and urgent necessities, the statute under which I am acting was enacted; by which, in a brief and summary manner, on a decision of the question of succession in fact, merely,

the incumbent should be put into possession of the books and papers for the time being. Thus until the title could be ultimately ascertained by the only conclusive adjudication, the person in and exercising the functions of the office with color of title should be placed in possession of the books and papers incident to its use.

This proceeding under the statute is not the proper one to determine the title to the office, nor to confer possession of it, and when resorted to in the case of contesting claimants like the present, it should not be allowed to do more than merely to enable the actual incumbent—the one in and occupying—to get possession of the books and papers, as the means of performing the duties of it for the time being.

There would, therefore, seem to be propriety in limiting the decision of this question, in most cases, to the magistrate before whom it should originate, or at least in allowing proceedings before him to be terminated, and his judgment to be executed, before a stay of proceedings should be allowed. The question of temporary possession of books, &c., necessary to the performance of the duties of an office, would seem to be a very suitable one to be determined speedily, and so this act seems to contemplate that it shall be, and such is the course in practice. But that no error, however palpable, should be corrected by a revisory tribunal, or warrant a suspension of a proceeding of this kind in any case, does not seem necessary, or to have been the intent of the legislature. All the usual means of procrastination are excluded. The time for appearing after service of process, the delays incident to formal pleadings, to formal trials in term time, indeed all formalities are dispensed with for the sake of speed in arriving at the result. But one single mode of reviewing and correcting errors is left, and that by aid of the writ of *certiorari* —the venerable, hoary writ, as it was styled on the argument. This writ is not a matter of strict right, but is always in the discretion of the court, and is only to be allowed in cases of this kind, where the court sees that there is probable error;

and, further, that to review in this manner will, on the whole, conduce to substantial justice between the parties; and further, that it will do no harm to the public. This is the rule, and where it appears that injustice has probably been done, and that the error can be corrected on *certiorari*, without hardship to the party against whom the writ is asked, or detriment to the public, it should be granted, and in these cases only should it be granted, say the authorities. Our reports abound in cases where, after solemn argument and grave deliberation, the writ has been refused, and others, in which, after having been granted, it has been quashed, on the ground that general justice and the public interest did not call for it, or perhaps seemed opposed to it. Such is the case of *The People, ex rel. Church*, v. *The Supervisors of Allegany County*, (15 *Wend.* 198;) and numerous other cases are there cited to the same end. Throughout the opinion in that case, the learned Judge (Bronson) treats it as a writ only to be allowed on special cause shown, and when, in the discretion of the court, it appears that substantial justice between the parties requires, and the public interest at least permits it. That was a motion to quash a writ already granted, and the court allowed the motion entirely on the ground that it ought not to have been granted, (the public interest seeming inconsistent with it,) whether the relator had sustained wrong or not, and whether he had or had not any other remedy. He expressly excludes all inquiry into that, and virtually, for the purpose of the argument, assumes that he might have, and indeed that there might be no other remedy. He says: "Whether the relator has in truth sustained an injury, I do not think it necessary to inquire; nor do I feel called upon to point out a remedy."

From what I have said it appears, I think, that this remedy by *certiorari* is well hedged about with safeguards. First, that it should appear probable that wrong has been done; and, second, that the writ will not operate oppressively; and that both these particulars should be determined by the court before the writ is allowed, and, indeed, ***that it should be***

quashed after it is allowed, if it do not appear that both the requisites occur in the case. (15 *Wend.* 198.) This seems to me to answer the argument that the writ should not, and therefore does not, operate to stay a proceeding like this, because of the danger that it would defeat the end designed by the proceeding itself. If the judgment sought to be reviewed, after careful examination, seems to be wrong, and it also seems, *after like careful examination*, that no harm can be done by allowing the writ to take its course, (questions with the decision of which I have nothing to do, but both of which the court granting it is bound to decide in favor of the applicant before it allows it,) that the writ, when allowed, should operate to stay the proceedings until a review of them can be had, would seem not only not inconsistent with this remedy, but there would seem to be no good ground to object to the practice on principle or in policy. The case of *Lynde* v. *Noble*, (20 *John. R.* 80,) only decides that a *certiorari* issued to a justice to review proceedings before trial, under the "Act to amend the act concerning distresses for rent, and for other purposes," passed April 17, 1820, should be quashed. It is far from deciding that while the *certiorari* was in force, the officers to whom it was issued might disregard it. In that case it was prematurely issued, being before the trial, and the officer to whom it was directed did disregard it, so far as to finish the trial to be sure, but no action was taken to determine the effect of his acts upon himself or third persons, and, therefore, nothing is decided on that subject, and even *he* refused what I am asked to do—to issue a warrant—until the *certiorari* was quashed. So that case is no authority for the act I am asked to perform; and indeed, it seems to be assumed throughout the opinion of the court, that the writ did operate to suspend the powers of the officer after he had made his decision, which is exactly the condition of this case.

2. It is said that the order made by the court the day after the *certiorari* was issued and served, to the effect that said writ should not be deemed to operate as a stay of proceed-

ings, or to interfere in any manner with the proceedings before me, prevents it having any such effect. But if the *certiorari* the day before suspended my powers and functions, it is not easy to see how an order of this kind could restore them—the writ being still in existence. The writ itself, of its own force, (*ex proprio vigore*,) when allowed and served, terminated my powers, if it had any application to disturb the proceeding at all; and while it remained unrevoked and in force as a writ I doubt very much if its legitimate effect could be thus modified by an order of the court itself. My powers are suspended, if at all, by a transfer of the proceedings from me to the supreme court, and a necessary consequence of this would seem to be that I am not in possession of the case, and can take no steps in it. The allowance of the writ was unconditional, and this order, if it have any effect, must have the effect to revoke some part of it, while by its terms it would seem not so much designed to revoke the allowance as to explain it, and declare or order that the writ shall not be deemed to have a certain effect usually supposed to follow as a legal consequence from it. What the effects of a *certiorari* are is a question of law, and is not to be determined by declarations. It was urged on the argument, and not denied, and perhaps I am at liberty to assume that the court, when it allowed the writ, refused, and did not intend to allow a stay of proceedings. That would not alter the effect of the writ in that respect, if, as it seems, it operated as a stay. The mere saying by the court, in an order, that a writ of *certiorari* or *habeas corpus*, or other process, shall not perform the functions assigned to it by law, or that one of these writs shall have the effect of the other in a particular case, cannot make such a writ operate as it is declared to, differently from its legal province. The chief, and perhaps the only immediate effect of this writ, is to remove the proceeding from before the officer to whom it is issued to the supreme court. Can an order to the effect that notwithstanding it is removed from before him to the supreme court, still it remains, and

shall be deemed to remain, before the officer from whom it is taken, have that effect and make it ubiquitous to that extent?

The case of *Patchin* v. *The Mayor of Brooklyn*, in some of its *obiter dicta* and head notes, seems to conflict with some of these views, I am aware, but I think that nothing *decided* in that case does conflict materially with them.

The fatal effects of the writ upon this proceeding, the fact that it terminates and annihilates, for practical purposes, the whole matter, would be excellent ground for an argument to the legislature to show the necessity of a modification of the law, perhaps; and could, perhaps, have been properly addressed to the court in opposition to the allowance of this writ in the first instance; and it may be of service on the motion to quash it if such a motion should ever be made, but it can have but little weight with me in determining what are the legal consequences of the writ when allowed and in force.

That the court misunderstood the situation of the proceeding at the time of the allowance of the writ, and would not have allowed it, if it had correctly understood it, may also be a good argument on a motion to the same court to quash it; but I cannot know the fact; and if I could, such information would not properly be the basis of action by me. I am to obey the writ as it is, so long as it continues to stand, not to indulge in speculations as to what might or would have been done by the court as to allowing it under other circumstances. My duties depend on what it is, not at all on what it might have been, or what was the intent of the court at the time, except as it is expressed by the fact of allowing it. The fact that the court refused to grant a stay of the proceedings asked in connection with it, and the fact that the same court which made the allowance has since made the order above referred to, seems to show that it was not the intention of the court that any thing having the effect of a stay should receive its sanction, and this fact would probably control on an application to that court, in which alone the impediment complained of can be removed.

It was urged, also, that the signing and delivery of these warrants were judicial acts, and that therefore they were not restrained by the *certiorari*. But my judgment has not only been announced orally, but reduced to writing in the form of an order, and signed by me and delivered to the applicant. I have there decided that the applicant should have the warrants. Is it possible that the writing of these papers, and signing and delivering them, are judicial acts? And even if they were, they are, so far, separate acts, distinct from the previous proceedings at the trial, that the principle which authorizes the completion of a trial because it is begun, (as in the case where the venire had been awarded,) would not apply here to justify me in proceeding. But it seems to me that it certainly is not a judicial but a ministerial act, and that, therefore, I am bound to refrain.

Finally, I see no mode of escape from the restraining influence of this writ while it remains in force, and the only remedy for the applicant seems to be by resort to the court granting it, and to that court I must commend him. My hands are certainly bound, and I am contrained to suspend my proceedings, and decline for the present, to issue the warrants.

[New York Special Term, July 17, 1857. *Peabody*, Justice.]

THE PEOPLE, *ex rel.* Charles Devlin, *vs.* C. A. PEABODY.

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21b 528
22b 471

A *certiorari* to remove proceedings instituted before a judge, to compel the delivery of books and papers by a public officer to his successor, will not be granted while the proceedings are still pending and undetermined.

The allowance of a *certiorari* rests in the discretion of the court.

MOTION to supersede a writ of *certiorari* which had been issued, to remove proceedings pending before Justice Peabody to compel the delivery, by Charles Devlin, to Daniel

D. Conover, of the books and papers connected with the office of street commissioner for the city of New York.

D. D. Field, for the motion.

C. O'Conor, opposed.

DAVIES, J. The motion in this matter, to supersede the writ of *certiorari*, is founded upon the allegation that the proceedings before the officer, which are sought to be reviewed by it, are yet incomplete and unfinished. The object of the writ is to obtain the judgment of this court before the question is decided by the officer before whom these proceedings are pending.

A writ of *certiorari* is the appropriate remedy to obtain a review by this court of the decisions and proceedings of inferior tribunals, not of record, and the writ is generally allowed as a matter of course, unless it is apparent to the court that injustice would thereby be done. It is often refused when asked for, frequently quashed by the court on its return, and not unfrequently superseded by the court allowing it. In the present case the writ is asked for to obtain a review of the proceedings had before one of the justices of this court, in pursuance of the provisions of article 5, title 6, chap. 5 of part one of the revised statutes. This article is entitled, "Proceedings to compel the delivery of books and papers by public officers to their successors." The 50th section of this title declares that whenever any person shall be removed from office, or his term shall expire, he shall on demand deliver over to his successor, all books and papers in his custody as such officer or in any way appertaining to his office. Section 51 provides, that if any person shall refuse or neglect to deliver over to such successor any books or papers as required, such successor may make complaint thereof to the chancellor, any justice of the supreme court, circuit judge, or first judge of the county where the person proceeded against resides, and if

such officer is satisfied that any books or papers are withheld, he shall grant an order, directed to the person refusing, to show cause why he should not be compelled to make such delivery. At the time appointed the officer is to proceed and inquire into the circumstances. If the person charged with withholding the books and papers shall make oath that he has truly delivered over to such successor, all such books and papers, all further proceedings shall cease. If such affidavit is not made, and it shall appear that such books and papers are withheld, such officer is required to commit such person to jail, there to remain until such books and papers are delivered. Section 54 of this act provides that such officer, if required by the complainant, shall issue his warrant commanding such books and papers to be brought before him, and he shall thereupon proceed to inquire and examine whether the same appertain to the office; and if he shall find that the same appertain to the office, he shall cause them to be delivered to such successor. Section 56 authorizes the same proceedings to be instituted against any person, to whose hands shall come any such books and papers, belonging or appertaining to any such office.

In pursuance of these provisions of law, the proceedings have been instituted before one of the justices of this court, and at the time of application of the complainant for the warrant to commit, consequent on the refusal of the person complained of, to deliver such books and papers in compliance with the order of such officer, and at the time of the application for the search warrant to bring such books and papers before such officer, that he might proceed to inquire and examine whether the same appertained to such office, and while such applications were pending and before the same were determined, the person proceeded against obtains the writ of *certiorari* for the purpose of having such proceedings removed into this court.

I think it is apparent from the perusal of this statute, that the legislature intended by its enactment to provide for a more speedy and prompt action to compel a delivery to a pub-

lic officer of books and papers which were withheld from him. The duties of such officer could not be discharged without such books and papers, and any delay in their delivery would cause great public inconvenience, and might, by a preconcert in a body of public officers, entirely suspend the functions of government. To obviate and prevent calamities so disastrous to the public welfare, these stringent and prompt remedies were provided. The proceedings were to be taken before such a class of officers as the legislature judged most safe to intrust with the exercise of this high and delicate power. They were intended to insure, in any and every contingency, the possession by every public officer of the books and papers of his office, essential to the discharge of his public duties. It should be borne in mind, also, that these provisions are not made for the benefit of the officer, but for the safety and convenience of the public, so that in no contingency shall any public officer be deprived of the means of discharging the duties of his office. These proceedings determine nothing as to the rights of the contestants to hold office. An appropriate and well known action is provided for that purpose, and which by provision of law in this state, is in all courts to have priority over all other cases, so that its prompt decision may be arrived at. But the provisions of this statute are intended to insure no delay or interruption in the discharge of the duties of any public office. It is true that they are not to be invoked by any man who sets up a claim to an office for the purpose of intruding himself and ousting the rightful possessor; and the legislature, in the selection of the officers authorized to execute this statute, have secured to them every guard against its abuse or perversion to injustice. An eminent judge of this state has said, that "an officer, acting under the statute in question, has no right to grant the order prayed for, until the title of the applicant is clear and free from all reasonable doubt."

Two of the justices of this court have decided that the claimant of these books and papers has a fair color of title to the

office to which they appertain. And the justice of this court before whom the proceedings are pending, has decided that the claimant is a successor in office of the late incumbent, and as such is entitled to the custody of the books and papers to enable him to discharge the appropriate duties of his office. I concur in the views of one of my associates, as expressed in an application made to him to restrain the delivery of the books and papers to the claimant, and in effect to restrain the proceedings of the officer in the matter then before him; that "although not bound by the decision as an absolute *res judicata*, I am bound to respect it as a controlling consideration in a matter addressed to my judicial discretion and my sense of judicial fitness. The public order and the harmonious action of the judiciary, as was in substance observed by a late distinguished chancellor, are more important than the rival claims, however interesting to the immediate parties, of two competing flour inspectors and a street commissioner." These considerations induced me, when application was first made for the writ of *certiorari*, to refuse to accompany it with any stay of proceedings; and on the subject being brought again to my notice, to make an order that the writ should not in any way operate as a stay or interruption of the proceedings pending before my associate.

I had supposed that all his judicial action had terminated, and that the effect of the trial was to bring in revision solely the right of the claimant to the books and papers. I did not lose sight of the intention of the statute to have such delivery speedy and effective, nor did I think the party proceeded against had no remedy. It is right, after compliance with the order of the officer, to have the correctness of his decision reviewed in this court. If evidence it will be received, and the papers and books will be returned to him. If correct, every consideration showed that the books and papers should be delivered in compliance with the order. It is better that the parties to this proceeding should be put to some inconvenience (no substantial legal right is jeoparded by a compliance with

this order,) than that a public statute passed for wise and beneficial purposes, and essential to the due administration of government and the discharge of the duties of its public officers, should be practically set at naught.

It was conceded on the argument that the allowance of this writ rested in the discretion of the court. Such discretion, however, is to be exercised with a deep sense of duty as well to the applicant for the writ, as to the rights of the public and the consequences which might follow from granting it.

The case of *Lynde* v. *Noble*, (20 *John.* 80,) shows that in no case should it be granted until there has been a final adjudication of the matter by the officer before whom the proceeding is pending. And even in such cases it has been refused, where the court saw that great injustice and wrong might result from issuing it. I am satisfied, as I was when this case was first presented to me, that I ought not to interfere at all with the proceedings while pending before the officer undetermined; that I have the discretion to grant or refuse the writ of *certiorari*, and that, having granted it, with the qualification that it should not operate as a stay of proceedings, and being clearly of opinion that it ought not to operate as a stay, and it being insisted upon by the relator who procured its allowance that it is a stay, I have no doubt that it is my duty to do in effect what this court did in the case of *Patchin* v. *Mayor of Brooklyn*, (13 *Wend.* 671,) direct a supersedeas of the writ, and the same is superseded accordingly.

[New York Special Term, July 18, 1857. *Davies*, Justice.]

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37h 12

LEARNED *vs.* TALLMADGE.

N., who died in 1817, by his last will and testament, gave and devised certain real estate to W. N. S. and H. O., and their heirs, and to the survivor and his heirs, in trust to pay over the rents and profits for the sole and separate use of A., the wife of J. L. S., during the joint lives of A. and her husband; and in case J. L. S. should survive A. then in trust, during his lifetime, for their children; and in the event of J. L. S. surviving his children, then upon the further trust to pay over the rents and profits to him during his life. And he gave full power and authority to J. L. S., by last will and testament, to convey and dispose of the said real estate, or any part therof, and to limit and appoint the uses thereof in such manner as he might deem proper; and in case of his dying without having made such appointment, the land was devised to the issue of J. L. S. living at the time of his death. J. L. S. had two children, F. N. S. and R. S. On the 3d of March, 1840, a deed was executed by the trustees, of the first part, and J. L. S. and A. his wife and F. N. S. of the second part, to R. S. of the third part, by which the parties of the first and second parts conveyed to the party of the third part, in fee, a portion of the said real estate. The deed also contained a covenant by which J. L. S. covenanted and agreed that he could not and would not make any disposition of the premises thereby conveyed, by any last will and testament, and that all his right, title and interest in the premises thereby conveyed, and all his beneficiary interest in the premises, was forever extinguished, relinquished and ended. J. L. S. died in 1852, leaving no issue him surviving; his sons having previously died without issue. He left a will, by which, after referring to the power contained in the will of N., he gave and devised to his wife, A., in fee, the real estate so devised in trust by N. A. subsequently conveyed the same to W. J. N., who conveyed the land to the plaintiff.

Held 1. That upon the death of N. the title to the land vested in the trustees during the life of J. L. S. with remainder over to his issue living at the time of his death, subject nevertheless, to the power of appointment contained in the will. That as J. L. S. left no issue living at the time of his death, the title to the premises, upon his failure to appoint, would have vested in the heirs at law of N. And that J. L. S. having made an appointment in the manner authorized by the will, upon his death the title to the premises became vested in his widow as appointee, unless by the deed of March 3, 1840, he had divested himself of the right to make such appointment

2. That J. L. S. although the person for whose benefit the property was intended, in fact never had any beneficial interest in it. That he was therefore a stranger to the title, having no legal or equitable interest in it. And that the power conferred upon him belonged to that class styled powers *simply collateral*, a peculiarity of which class is that they can neither be barred nor extinguished by any act of the party in whom they are vested.

3. That the power of appointment given to J. L. S. was not extinguished by his executing the deed of March 3, 1840, but was properly exercised by his will, in favor of his wife.
4. That the deed executed by A., the widow of J. L. S., to W. J. N., was valid, and conveyed the premises to the grantee.
5. That A. was not estopped from taking under the will of her husband by having executed the deed of March 3, 1840; that deed operating merely to release to the grantee all the interest she then had in the land.
6. That the covenant of J. L. S., in that deed, that he could not, and would not, dispose of the premises by will, was to be regarded as a *personal*, rather than a *real* covenant;—as concerning J. L. S. personally, and not as owner of the land. That it did not affect a person claiming title to the premises under a subsequent conveyance from R. S. the son of J. L. S.

Where one enters into possession of premises under a conveyance giving him an estate for the life of another, and his estate ceases by the termination of that life, he then, being lawfully in possession, becomes the tenant by sufferance of the person entitled to the reversion, and cannot set up the defense of adverse possession, to an ejectment brought by one claiming title under a conveyance from the reversioner.

THIS action was brought to recover the possession of two parcels of land, together containing about 240 acres, situate in the towns of Coeymans and Bethlehem, in the county of Albany.

The facts which appeared upon the trial, are as follows: Francis Nicoll, who was the grandfather of John L. Sill, died in 1817, seised and possessed of the lands in question, and other lands adjoining. He left a will, which was duly proved on the 5th of January, 1818. The will contained the following devise: "I give and devise unto my grandson William R. Sill and Henry A. Oothout, Esquires, and their heirs, and the survivor and his heirs, all that part of my real estate in the town of Bethlehem and Coeymans, (describing a tract of land which includes the premises in question,) to have and to hold the said real estate upon the following trusts, and for the following uses and purposes, to wit: In trust to pay over the rents and profits thereof, for the sole and separate use of Abigail, the wife of my grandson, John L. Sill, during the joint lives of the said Abigail and the said John L. Sill; and in case the said John L. Sill shall survive

the said Abigail, then in trust, during the lifetime of the said John L. Sill, for the children or child of the said John L. Sill, lawfully begotten, in which last case, the said trustees shall pay over the rents, profits and proceeds of the said estate to the said John L. Sill, which shall be under his sole control, direction and management, for the maintenance, education and support of such children or child; and in the event of the said John L. Sill surviving such children or child, then I give and devise the said real estate to the said William N. Sill and Henry Oothout, and their heirs, and the survivor of them and his heirs, in trust to pay over the rents and profits thereof to the said John L. Sill during his lifetime. And I do hereby give full power and authority to the said trustees and their heirs, and the survivor of them and his heirs, at any time during the continuance of the trust hereby created in them, and during the life of the said John L. Sill, to cut down any timber or wood upon the said premises heretofore devised, and to sell the same, and upon such sale I hereby direct that the proceeds of the said sale shall be paid to the said John L. Sill, for his sole use. *Item. I hereby give and devise to the said John L. Sill, full power and authority, by last will and testament under his hand, executed in the presence of three witnesses, in due form of law, to convey and dispose of all the said real estate, or any part thereof, and to limit and appoint the uses thereof, in such manner as he may deem proper. But if the said John L. Sill shall die without having made such last will and testament, and appointment as aforesaid, then, and in that case, I hereby give and devise the said real estate to the issue lawfully begotten of the said John, living at the time of his death, and his, her, or their heirs, any posthumous child or children to take as such issue.*"

John L. Sill had two children, Francis N. Sill and Richard Sill. On the 3d day of March, 1840, a deed was executed by William N. Sill and Henry A. Oothout, of the first part, and John L. Sill and Abigail his wife, and Francis N. Sill, of the second part, to Richard Sill, of the third part, whereby, after

reciting the provisions of the will above set forth, and that Richard Sill and Francis N. Sill were the only children of John L. Sill, and that John L. Sill and his wife, and their children, were the only persons in being who were beneficially interested in the trust estate, and that the trustees, at the request and by the desire of all the *cestuis que trust*, had consented to release and convey to Richard Sill a portion of the trust estate, the parties of the first and second parts did convey, &c. to the party of the third part, his heirs and assigns forever, all &c., (describing the premises in question.) The deed contained a covenant, as follows: "And the said John L. Sill, one of the said parties of the second part, hereby, as well by means of his being a party hereto as by his express declaration, covenants and agrees that he cannot and will not make any disposition of the premises hereby conveyed by any last will and testament, and that all his right, title and interest, in the said premises hereby conveyed, and all his beneficiary interest in the said premises is forever extinguished, relinquished and ended."

On the 13th of November, 1841, John L. Sill and Richard Sill executed their bond to Alfred A. Wood, conditioned for the payment of $8000, in three years from the date thereof, with interest, and to secure this payment, Richard Sill at the same time executed to Wood a mortgage upon the premises in question. This bond and mortgage was assigned by Wood to Norman Peck, on the 8th of February, 1842.

A suit for the foreclosure of the mortgage was brought by Peck, in the court of chancery, and on the 3d day of December, 1844, the usual decree in such cases was obtained, by virtue of which the premises were sold at public auction, on the 20th day of March, 1845, to Erastus Corning, for the sum of $2820, and on the 5th day of June following he received therefor the usual master's deed. On the 12th day of March, 1847, Corning released the premises to the defendant in this action. The consideration expressed in the deed was $2868.10.

John L. Sill died on the 26th of November, 1852, leaving

no issue him surviving, both his sons having previously died without children. He left a will, bearing date the 15th of May, 1852, which was proved and recorded on the 5th of February, 1853. By this will, after referring to the power contained in the will of Francis Nicoll, he gives and devises to his wife Abigail L. Sill, her heirs and assigns forever, all &c., (the premises in question.)

On the 7th of December, 1852, Abigail L. Sill conveyed the same premises by a deed with full covenants, to William J. Noyes. The consideration expressed in the deed was $2415.75.

On the same day, Noyes executed to Mrs. Sill an agreement whereby, after reciting the deed for the consideration mentioned, "being the present value of an annuity during the residue of her life at the rate of $250 per annum," he, Noyes, agreed to pay to her, during her natural life, the full sum of $250 annually, *to commence from the day of the date of possession and entry.*

On the 17th of January, 1853, Noyes, by a warranty deed, conveyed the premises to the plaintiff in this action. The connsideration expressed in the deed was $4000. The defendant offered to prove, on the trial, that the only consideration for the conveyance from Noyes to the plaintiff was a note for $1000. The evidence was excluded.

On the 23d of January, 1854, the plaintiff served upon the defendant a notice to quit the premises, and on the 21st of July following this action was commenced. The plaintiff alleged in his complaint that he had the lawful title and was seised of the premises; that the defendant was in possession and *unlawfully* withheld such possession. He claimed judgment for the recovery of the possession, and damages for the unlawful withholding of the possession. The defendant denied the allegations in the complaint. The action was tried at the Albany circuit, in October, 1854, before Mr. Justice HARRIS, without a jury

W. L. Learned, for the plaintiff.

S. W. Tallmadge, defendant, in person.

By the Court, HARRIS, J. The purpose of Nicoll, the testator, in reference to the premises in question, is easily discerned. He intended that his grandson, Sill, should have every benefit which could be derived from their use, during his life, and the unrestricted disposition of them, at his death. All the power withheld was that of alienation during his life. Hence, the care with which he provided that Sill and his family should have the rents and profits of the property in the various contingencies to which they were subject. He went further, and authorized the trustees to impair the value of the freehold itself, by cutting off the wood and timber, for the benefit of Sill.

The object of the testator was, to some extent, defeated by the deed of the 3d of March, 1840. He did not mean that any thing should be done which could have the effect to deprive the object of his bounty of the rents and profits of these premises while he lived. He protected him against his own inclination to part with the premises by confining his power to a devise, which, from its nature, could only take effect upon his death. Until then, the disposition he might at any time feel inclined to make of the property would remain revocable. And yet, by procuring the trustees to unite in the deed, he did succeed in defeating the purpose of the testator and depriving himself and his family of the use of the premises for the last eight or ten years of his life.

Upon the death of Nicoll, the title to the premises vested in the trustees during the life of John L. Sill, with remainder over to his issue living at the time of his death, subject nevertheless to the power of appointment contained in the will. As Sill left no issue living at the time of his death, the title to the premises, upon his failure to appoint, would have vested in the heirs at law of Nicoll. Having made an appointment in the manner authorized by the will creating the power, there can be no doubt that upon the death of John L. Sill, the title to the premises became vested in his widow as appointee, un-

less by the deed of March 3, 1840, he had divested himself of the right to make such appointment.

Although, as we have seen, Sill was the person for whose benefit the property was intended, yet, in fact, he never had any beneficial interest in it. The title was vested in the trustees during his life for the use of his wife and children. It was only in case he survived his wife and all his children that he was entitled to any thing at the hands of the trustees. It is true the trustees were authorized to cut down and sell wood and timber, and upon doing so they were required to pay over to Sill the proceeds. But it was discretionary with the trustees whether they would act upon this authority. It gave to Sill no beneficial interest in the land. He was, therefore, a stranger to the title, having no legal or equitable interest in it. The contingency upon which he would have become a *cestui que trust* never happened, for his wife survived him.

Such a power belongs to that class which has been denominated powers *simply collateral.* It is a peculiarity of this class of powers, that they can neither be barred nor extinguished by any act of the party in whom they are vested. Nor would the case be different, if it were conceded that Sill had an interest in the land as *cestui que trust.* The power would still be *collateral.*

A case quite analogous to this, in most of its features, is found in *Reid* v. *Shergold,* (10 *Ves. jun.* 370.) An uncle had devised to two trustees a certain estate in trust for the separate use of his niece, Mrs. Stables, for life, with power to her to dispose of the estate *by will,* and in default of the execution of the power, the estate was to pass under a residuary devise in the will. One of the trustees, only, accepted the trust, and he afterwards surrendered the estate to Mrs. Stables. Thus she became entitled to the legal estate subject to the trusts specified in the will. Having the legal estate, and the entire beneficial interest for life, with authority to appoint to whom the remainder should go, she made a will, which had it remained unrevoked, would have been a good execution of the

power. Afterwards, in consideration of an annuity, she transferred the estate to a purchaser. It was held that the transfer, though invalid as a conveyance, amounted to a revocation of the will, and the power being in fact unexecuted, the estate passed to the residuary devisee. The lord chancellor, in deciding the case, said, "The meaning of the testator was this: he was providing anxiously, in every part of his will, that his niece should have the power of receiving the rents and profits, from time to time, for her separate use, tying up her hands from indulging her inclination against herself. He studiously confines her power of giving the premises, to a power of *giving by will*, a power in its nature revocable, in every period of life—the power given in that way to protect her against her own act. She had nothing *in point of interest*, but for her life. In *point of authority* she might, by her will, have made a disposition to take effect after death. The testator intended that she should give *by will* or *not at all*, and *it is impossible to hold* that the execution of an instrument or deed, which, if it availed to any purpose, must avail to the destruction of that power which the testator meant should remain capable of execution to the moment of her death, can be considered in equity an attempt in or towards the execution of the power. That therefore will not do." (*See also* 1 *Story's Eq. Jur.* §§ 97, 173; *Chance on Powers*, § 2877.)

The sale by the donee of the power, in *Reid* v. *Shergold*, after she had made her will executing the power, was regarded as a revocation of the will. The power was thus left unexecuted. There is no reason to believe that, if the donee had, subsequent to her conveyance of the estate, made another will in execution of the power, the appointment would have failed to take effect. Certainly there is no intimation to this effect in the report of the case.

If, in this case, the life estate which was vested in the trustees had been given directly to Sill himself, the deed of the 3d of March, 1840, would not have operated to extinguish the power. Such a power would be a *power in gross*, and

might be extinguished by feoffment and livery of seisin. "The feoffment," says Kent, "operated upon the possession without any regard to the estate or interest of the feoffor. It had the transcendent efficacy of passing a fee by reason of the livery, and of working an actual disseisin of the freehold. It cleared away all defeasible titles, divested estates, destroyed contingent remainders, *extinguished powers*, and barred the feoffor from all future right, and possibility of right, to the land, and vested an estate of freehold in the feoffee." (4 *Kent's Com.* 481.) But this deed is a mere grant, and only operated upon the estate or interest which the grantors had in the land and might lawfully convey. It is what the common law writers technically called "*an innocent conveyance*," because it passed such interest as the party executing the grant had, and no more. A tenant for life, having a general power to dispose of the reversion by appointment, might execute a grant in fee and afterwards execute the power. But if he had conveyed by feoffment, with livery of seizin, the power would have been destroyed. "An assignment of *totum statum suum*," says Sugden, in speaking of this class of powers, "does not affect such power, because the power does not fall within the compass of his estate, but takes effect out of an interest not vested in him. And although the tenant for life assume to pass a fee, yet, if he convey by an *innocent conveyance*, as a bargain and sale, &c., the power will not be destroyed." (*Sugden on Powers*, 2*d Lond. ed.* 61.) Again the same writer says, page 62, "the cases seem to establish this general principle, that every power in gross may well be exercised, although the donee may have previously parted, by an innocent conveyance, with the estate to which it was annexed." (*See Revisers' note to the article of the Revised Statutes on powers; also*, 13 *Petersdorff Ab.* 644, *note.*)

Nor can I see how the defendant's case is improved by the covenant of Sill, that he could not and would not dis ose of the premises by will. I am inclined to regard this covenant as *personal* rather than *real*. It concerned Richard Sill, who,

though not so expressed in the deed, is to be deemed the covenantee, *personally*, rather than as *owner of the land.* By virtue of the deed itself, he had acquired an estate in the land during the life of his father. He needed no such covenant as that contained in the deed to assure to him that title. The covenant was intended to operate upon the remainder which he had not yet acquired. If he and his brother should survive their father, and no will should be made in execution of the power of appointment, the remainder, by the terms of the will of Nicoll, would vest in them. Or, if he should survive both his father and brother, and no appointment be made, then the whole of the remainder would vest in him. He might be prevented from acquiring title to the remainder by the execution of the power. It was for his personal interest, therefore, that no appointment should be made, unless, indeed, it should be made in his favor.

But the defendant had no such interest. By virtue of the conveyances under which he claims, he had acquired an estate during the life of John L. Sill. The remainder must either pass to the heirs at law of Francis Nicoll, both the sons of John L. Sill being dead, and there being no devisee to take, or it must pass to a devisee to be appointed by John L. Sill. In which of these ways the title to the remainder should pass, was a question which did not concern the defendant. In neither event would it come to him. As the owner of a life estate in the land, therefore, the covenant of John L. Sill with his son that he would not exercise the power of appointment, did not affect the defendant. He was not, in any respect, injured by its breach. If the covenant had been to execute the power of appointment in favor of Richard Sill, his heirs and assigns, very different questions might have been presented.

It is insisted on the part of the defense, that Mrs. Sill, having executed the deed of the 3d of March, 1840, is estopped from taking under the will of her husband. At the time she executed the deed, Mrs. Sill had the entire beneficial interest in the land during the joint lives of herself and her husband.

The effect of the execution of the deed, by her, if indeed, it had any validity, was to release to the grantee all the interest she then had in the land. The deed contained no covenants for the future. Indeed, being a *feme covert*, she was incapable of doing more than to release her present interest. There was nothing which rendered her incompetent to take the remainder of the estate by appointment, if such appointment could legally be made, and that it could, we have already seen.

The act of the legislature passed in 1852, (*Sess. Laws of* 1852, *ch.* 322,) can have no effect upon the questions now under consideration. It had been declared by law, that where the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees, in contravention of the trust, shall be absolutely void; and, again, that no person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest. (1 *R. S.* 730, §§ 63, 65.) In view of these provisions, the validity of the deed of March 3, 1840, might well be doubted. At the time the act of 1852 was passed, the interest which Richard Sill took under the deed of March 3, 1840, whatever it was, had become vested in the defendant in this action. His object in procuring the passage of the act is apparent. He desired, if possible, to supply the obvious defect in his title, arising from the want of power in the trustees and those beneficially interested in the trust, to convey. For this purpose the legislature were induced to declare that the conveyance of March 3, 1840, should be as valid and effectual as if the trustees and parties of the second part had been previously and duly authorized to sell and convey. The object of the act, undoubtedly, was to prevent, if legislation could do it, the deed to Richard Sill from being declared void under the provisions of the revised statutes, to which I have referred. Whether it could have even that effect is a question which I need not now determine. It is certain, that it could not have the effect to vest in the grantee

any greater title or interest in the land than the grantors then had.

One other question remains to be considered—the question of adverse possession. The defendant insists that the conveyances under which the plaintiff claims title are void, because at the time they were delivered he, the defendant, was in actual possession of the premises, claiming under a title adverse to that of the grantors in these conveyances. (1 *R. S.* 739, § 147.) I do not think this position can be sustained. The defendant entered under a title which, at the most, gave him an estate in the land during the life of John L. Sill. Upon the death of the latter the defendant's term expired, and he then became a tenant by sufferance. This tenancy did not expire until one month after notice to quit had been served by the owner of the reversion. At the time of the conveyances from Mrs. Sill to Noyes, and from Noyes to the plaintiff, therefore, though in actual possession of the premises claiming title, the defendant did not claim under a title adverse to the title of the grantors in these conveyances. The *claim* of the defendant was adverse to that of Mrs. Sill and those deriving title from her. It was so, because the defendant misapprehended the effect of the conveyance under which he claimed to hold the premises. The title under which the defendant claimed was not, in fact, adverse to the plaintiff's title. The defendant had entered under a conveyance of an estate for the life of another. His estate ceased with that life. He then, being lawfully in possession, became the tenant by sufferance of the person entitled to the reversion, who turns out to be Mrs. Sill. When the conveyances in question were made, therefore, the defendant, whatever may have been his claim, was, in fact, the tenant, first of Mrs. Sill and then of her grantee. The title under which he claimed was not adverse to the title under which the plaintiff now claims. The conveyances, therefore, cannot be avoided upon this ground.

I have thus examined all the grounds of defense which were presented upon the trial of this action. I have bestowed upon

the case a much greater amount of attention than is usually devoted to a trial at the circuit, for the reason that the questions involved are important, and some of them, to me at least, novel, and having been fully and well argued on both sides, it was the mutual request of the parties, at the trial, that the decision should be made upon a full examination of these questions. That examination has led me to the conclusion that the plaintiff is entitled to judgment.

[Albany Special Term, October 6, 1856. *Harris*, Justice.]

Waterbury *vs.* Sinclair and others.

Where a promissory note was made by D. payable to W. or order, and before the delivery thereof to the payee it was indorsed by S., to enable D. to obtain credit with W. *Held* that S. was liable as indorser, to the payee, upon proof of presentment, non-payment and notice.

Held also, that no indorsement by the payee was necessary, in order to perfect his rights. His rights accrued when the note was delivered to, and accepted by him, and were in no manner dependent upon any additional indorsement.

The rule that the payee must first indorse a note, is founded upon the fact that he alone can transfer it: when there is no transfer the reason of the rule fails, and it is therefore inapplicable.

Where in an action against an indorser, the complaint alleges that the defendant agreed to guaranty the payment of the note, if that allegation is not made out, it may be disregarded as surplusage.

DEMURRER to complaint. The complaint alleged that on the 9th of November, 1855, the defendant George Dick was indebted to the plaintiff in the sum of $308.42 for rent, and upon a promissory note made by the defendant; that for the purpose of securing the said indebtedness, and also the further sum of $100 which would become due for rent, on the 1st of February then next, and in consideration of the forbearance of payment by the plaintiff, and as an inducement for

the plaintiff to allow the said Dick to remain in posesesion of the premises rented, Dick agreed to make and deliver to the plaintiff his promissory note, indorsed and guarantied to the plaintiff by the defendant William Ann Sinclair, then a *feme sole*, and known by the name of William Ann Lawson, payable in three months, for $413.82, being the amount of said indebtedness, with interest, and the said rent; and that the said William Ann Lawson, with a full knowledge of the above facts, and for the same consideration, agreed to indorse and guaranty said note to the plaintiff. The complaint further alleged that in pursuance of said agreement, Dick, on the said 9th of November, 1855, made his promissory note in writing, bearing date on that day, whereby, for value received, he promised to pay, three months after the date thereof, to the plaintiff or order, the said sum of $413.82 for value received, at No. 190 Pearl street in the city of Brooklyn; and the defendant, William Ann Sinclair, indorsed the same, by the name of W. A. Lawson, and the same was afterwards duly delivered to the plaintiff, who thereby became, and ever since has been, and now is, the sole owner and holder thereof. The complaint then alleged presentment of the note for payment, on the day it became due, refusal of payment, protest and notice to the defendant W. A. Lawson. That since the note became due, and during the year 1857, the defendant William Ann Lawson married the defendant Sinclair, and was now his wife; and that no part of the said note had been paid to the plaintiff.

The defendants, Sinclair and wife, demurred to the complaint, and assigned as ground thereof, that the same did not state facts sufficient to constitute a cause of action.

Theodore F. Jackson, for the plaintiff.

J. Paulding, for the defendants.

S. B. Strong, J. This is an action on a promissory note, by the payee against the maker and indorser, who was a *feme*

sole when she indorsed the note, but has since married, and her husband. The note was payable to the plaintiff, or his order, three months after its date. It was partly for a debt from the maker to the payee, existing at the time, and partly for prospective rent, and was made and indorsed pursuant to an arrangement between the maker and the payee, to extend the time for the payment of the debt, and to permit the continued occupancy of the demised premises, which was known to the indorser. It was indorsed in blank before it was delivered to the plaintiff. The note was presented to the maker when it became due, and payment was refused. It was thereupon protested, and due notice was given to the indorser.

As the note was negotiable, and there is no express engagemen by Mrs. Sinclair, as guarantor, she must be considered as an indorser only. The allegation, in the complaint, that she agreed to guaranty the payment of the note, is not, therefore, made out; but as that is coupled with the averment that she agreed to indorse it, what is said in reference to the guaranty may be considered as surplusage. The plaintiff can sustain his suit if he should prove enough of the averments in his complaint to maintain an action, although he may fail in establishing the whole.

The main question is, whether one who has indorsed a note, before delivery, can be made liable to the payee who has not indorsed it. That one may become an indorser under such circumstances, appears to be well settled. An indorsement by the payee is undoubtedly essential to a valid transfer of the note when it is payable to his order; and when he actually indorses it, I cannot see that he can maintain an action upon it against a subsequent indorser. That, if permitted, would be an invasion of the usual order of liability. The idea of the late chancellor, that a subsequent indorser may be rendered responsible to a prior one, by an indorsement by the latter without recourse to him, and a delivery of the note to some nominal plaintiff, who might prosecute for him, was dismissed when it was advanced by a learned member of the court for

the correction of errors, and at any rate is not now considered to be sound law. That any one who writes his name upon the back of a negotiable note, not then indorsed by the payee, assumes an inchoate liability, there can be no doubt. If the name and signature of the payee should afterwards be prefixed, that would be clearly all that would be formally necessary to consummate the responsibility. That would, as I conceive, be absolutely necessary in all cases where the holder was to be any other than the payee. But is there the same, or any, necessity for an indorsement by the payee when there is a general indorsement by another designed for his benefit? What is the general engagement by the indorser? It is to pay the note to any subsequent holder, provided it is duly presented to, and payment received by, the maker, and due notice of non-payment is given. It can make no difference, as I conceive, whether the subsequent holder is the payee, or another. There is the same equity in favor of either, and there is no technical rule against the liability to the payee, unless he is also the prior indorser. An indorser of a promissory note is considered in the light of a drawer of a bill of exchange upon the maker, to pay the amount to any subsequent holder, whether named or not. (*Chitty on Bills*, 155, 156, *and the cases there cited.* Surely he can make the bill of exchange payable to the person named in the body of the note as the payee. There is no principle applicable to commercial paper which forbids that. That it may be an order upon the maker to do what he at the same time engages to do, can make no difference. That is done, or is the effect of what is done, in other cases; as where there has been a previous promise of the drawee of a bill of exchange to accept it, or where a bill payable at a future day has been accepted. There are, in such cases, both an order from one and a promise by another, upon such order already made, or to be made, to pay. In substance, the note in question contains a promise to pay money to the payee, upon the order of the indorser; and that under such circumstances an action may be main-

tained by the payee, against the indorser, was decided in the case of *Willis* v. *Greene*, (10 *Wend.* 516.) There is no necessity for proving a valid consideration for the obligation of an indorser, and certainly none for reducing the consideration to writing. He is not considered as entering into a special promise to answer for the debt, default or miscarriage of another person, within the statute. An entire want of consideration might be available between the original parties, at common law, but in this case enough is averred to cause the liability of an indorser. The case of *Gilmore* v. *Spies*, (1 *Barb.* 158. 1 *Comst.* 321,) was much like that now under consideration, except that no notice had there been given to the indorser. He escaped solely on that ground. The counsel for the defendant, in that case, who was an acute and experienced lawyer, contended before this court that the indorser was "only liable on condition of a demand of payment at the expiration of the days of grace, and notice of non-payment." He did not contend, nor did this court assume, that the indorser would not have been liable if demand of payment had been duly made, and notice of non-payment had been given. If in that case the indorser had not originally assumed any liability to the payee, that would have been a sufficient defense for him, and it would have been unnecessary to consider any other. When the case was before the court of appeals, the defendant was considered by Judge Bronson to be an indorser, and as such to be entitled to notice of non-payment. Such was also the opinion of Judge Jewett; but Judge Gardiner dissented, and held that the defendant by his indorsement contracted that if the note was duly demanded of the maker, and not paid, or if, after the exercise of due diligence, no such demand could be made, he would, on due notice, pay the amount to the indorser or holder. In that case, as in this, the action was by the payee of a note against the indorser; and neither counsel nor any of the judges supposed that the indorser did not assume any liability to the payee. In the case of *Herrick* v. *Carman*, (12 *John.* 159,) the note, it is true, had been

indorsed by Herrick when it was delivered to the payee; but they subsequently prefixed their indorsement, and then sold it to Carman, at a large discount, the facts being known to him. Chief Justice Spencer remarked that it did not appear that Herrick indorsed the note for the purpose of giving the maker credit with the payees, or that he was in any wise informed of the use to which the maker intended to apply the note; and that in the absence of any proof to the contrary, the court must *intend* that Herrick meant only to become *second* indorser, with all the rights incident to that situation. The chief justice adds, that Herrick must have known that his indorsement would be nugatory unless preceded by that of the payees of the note. He cites no authority for this, and it is to be presumed that what he said was in reference to the circumstances of that case, and that he did not intend to lay down the rule as of universal application. The case of *Ellis* v. *Brown*, (6 *Barb.* 282,) was where there had been a transposition of indorsements, and the question was, whether in such case an indorsee in effect could recover against his indorser, and it was rightly decided that he could not. That is certainly the rule when the payee of the note actually indorses it, or when his indorsement is necessary to give it effect in the hands of him who seeks to enforce it. But in the present case no indorsement by the payee was necessary, in order to perfect his rights. His rights, whatever they were, accrued when the note was delivered to, and accepted by, him, and were in no manner dependant upon any additional indorsement. What they were has been already shown. I repeat, that the rule that the payee must first indorse a note, is founded upon the fact that he alone can transfer it; and that where, as in this case, there was no transfer, the reason of the rule fails, and it is therefore inapplicable.

There must be a judgment for the plaintiff, with leave to the defendants, Sinclair and wife, to withdraw their demurrer, and answer in twenty days, upon the payment of costs.

[Kings Special Term, November 2, 1857. *S. B. Strong*, Justice]

UMBARGER *vs.* PLUME & BURGOYNE.

In 1853 the plaintiff deposited a sum of money with the defendants, taking from them a certificate of deposit, stating that the money was payable to his order on the return of the certificate with his indorsement thereon. In December, 1853, the partnership between the defendants was dissolved. The business was continued by B. one of the firm, who published a notice in the newspapers, that he would pay all the certificates of deposit of the late firm. There was no proof that the plaintiff ever saw, or heard of, the notice. He did not present his certificate until September, 1855, when he presented the same, and demanded payment. *Held* that the defendants were not discharged from their liability by the omission of the plaintiff to present the certificate in accordance with the notice.

Held also, that the plaintiff could recover upon the certificate, without having previously indorsed it.

IN 1853 the defendants, Plume & Burgoyne, were in business together as bankers in San Francisco, in California. On the 14th of October, 1853, the plaintiff deposited with them $1300, and received from them a memorandum to that effect, or as it is called a certificate of deposit, which stated the fact of such deposit, and that the sum was payable to his order on the return of that certificate with his indorsement thereon. In December, 1853, the copartnership was dissolved, the defendant, Burgoyne, continuing the business. Immediately upon such dissolution, the defendant, Burgoyne, published a notice in all the papers in San Francisco, stating that he would pay all the certificates of deposit of Burgoyne & Co. The plaintiff did not present his certificate, and in February, 1855, failed in business. In September, 1855, the plaintiff presented the certificate to Burgoyne at the banking house of Burgoyne & Co., and demanded payment, which was refused, and the sum mentioned in it has never been paid. The cause was tried before Justice CLERKE, without a jury, and judgment rendered for the plaintiff for $1486.32, the amount of deposit and interest. The defendants appealed from the judgment.

R. Goodman, for the defendant Plume.

Capron & Lake, for the plaintiff.

By the Court, DAVIES, J. We see no error in the ruling of the justice at the trial. The plaintiff had loaned to the defendants $1300, which they were bound to repay to him on demand. It is conceded that the money has never been paid, and the defense set up, that the defendant Plume was discharged from this debt because the plaintiff did not call on the defendant Burgoyne for it, in accordance with the notice in the San Francisco newspapers, is entirely untenable. It is in proof that the plaintiff did not reside in San Francisco, and it does not appear that he ever saw, knew, or heard of the notice. He was under no obligation to call for his money, if he had.

There is nothing in the objection that the plaintiff cannot recover until he has indorsed the certificate of deposit. He doubtless would have indorsed it if it had been paid, or offered to be paid, at the time he presented it for payment. And it being now in the possession of the plaintiff's attorney, it can be delivered up to the defendants on payment of this judgment; and such payment will be an extinguishment of all liability of the defendants or either of them, in consequence thereof, and a full protection to them.

The judgment below should be affirmed, with costs.

[NEW YORK GENERAL TERM, November 2, 1857. *Mitchell*, *Davies* and *Clerke*, Justices.]

SMITH *vs.* WEEKS.

26 463
40 515
43 316
65a 580

The principle of *res adjudicata* is only applicable to matters directly adjudicated, and not to matters which might have arisen incidentally or collaterally.

It is not enough to estop a plaintiff from maintaining his action, that the matter upon which it is founded might have been available in a former suit between the same parties.

Where W. commenced proceedings against S. under the mechanic's lien law, and recovered a judgment for the amount of his account, by default, without giving S. credit for the amount of a receipt and an order which S. had paid to him; *Held* that S. might maintain an action against W. to recover the amount so paid.

When W. received the money specified in his receipt, and when he drew the order upon S. and the same was accepted and paid, there was an implied agreement on his part that those sums should be credited upon his account against S. And in omitting to make the application, he was chargeable with a breach of good faith.

THIS was an appeal from a judgment rendered at the Ulster circuit, in February, 1856. The cause was tried without a jury. The plaintiff gave in evidence a receipt, as follows: "Kingston, January 26, 1853. Received from Henry J. Smith ninety-eight dollars on Methodist church, and eighty dollars cash, on account. Whiting Weeks." Also an order as follows: "Mr. Henry J. Smith, pay C. F. Phillips thirty-five dollars and charge the same to my account. January 27, 1853. Whiting Weeks."

The plaintiff then proved that in March, 1853, the defendant commenced proceedings against him, under the provisions of the mechanics' lien law applicable to the county of Ulster, upon an account amounting to $1371.38, and, in August following, the defendant recovered a judgment against the plaintiff for the amount of his account, by default. It was admitted that the plaintiff had not been credited with the money mentioned in the instruments upon which this action is brought.

The testimony being closed, the defendant's counsel moved for a nonsuit, on the ground that the plaintiff was bound to interpose his demand as a defense to the proceeding under the

lien law, and not having done so, he was barred by the judgment from recovering his demand in this action. The court granted the motion, and judgment having been perfected in favor of the defendant, the plaintiff appealed to the general term.

E. Cooke, for the plaintiff.

T. R. Westbrook, for the defendant.

By the Court, HARRIS, J. None will deny that the plaintiff ought to recover the money for which he has brought this action, if a recovery can be had without violating any principle of law. The defendant has had the money. It was paid by the plaintiff, and yet he has received no benefit from such payment. Ordinarily, this is sufficient to lay the foundation for an action.

But it is insisted that this cannot be done without again drawing in question matters determined by the judgment recovered by the defendant against the plaintiff. If this be so, the objection is, of course, fatal to the action. For all courts agree that a matter which has once been determined by a court of competent jurisdiction, cannot be reviewed or re-examined in another suit between the same parties. *Judicium semper pro veritate accipitur.* So long as the judgment stands, the matters adjudged are closed to all further examination.

This case, therefore, must depend upon the question whether there has been an adjudication upon the subject matter of this action. It is to be borne in mind, that the principle of *res adjudicata* is only applicable to matters directly adjudicated, and not to matters which might have arisen incidentally or collaterally. There can be no doubt that when the plaintiff found himself sued for the whole amount of the defendant's account against him, he might have interposed a defense, and insisted upon having the moneys for which this action is

brought allowed to him as payments upon the account. But was he bound to do this, and thus greatly increase the costs for which he must certainly become liable, at the peril of losing the payments he had made, in case the defendant should omit to give him the proper credits? When the defendant received the money specified in his receipt, and when he drew the order upon the plaintiff and this was accepted and paid, there was an implied agreement on his part, that these sums should be credited upon his account against the plaintiff. In omitting to make the application, he was chargeable with a breach of good faith. The judgment recovered was for the amount of the defendant's account. This is not questioned. But the thing of which the plaintiff complains is, that the defendant did not reduce that account, as he was legally bound to do, by the amount of moneys he had received from the plaintiff.

This view of the question is abundantly supported by authority. The case of *Rowe* v. *Smith*, (16 *Mass. Rep.* 306,) is directly in point. In that case, the defendant had held a promissory note against the plaintiff for $400. The plaintiff had paid the defendant $50 on account of the note, for which he took a receipt. Subsequently, the defendant brought an action upon the note and took judgment for the whole amount. The defendant in the judgment then brought his action to recover back the $50 he had paid, but which had not been allowed to him as a payment on the note. Parker, Ch. J., said, "Our first impression was against this action, but upon further consideration, we think it can be maintained. It is not like the cases in which, after judgment suffered, an action is brought to recover back the sum, or a part of it, which was the foundation of the judgment. In those cases a new trial is the proper remedy. Here, the creditor, by his own fault, recovered judgment for his whole debt, when a part of it had been paid. It was his duty to have credited the sum paid on the note, and not having done it, he is to be considered as retaining the money for the use of his debtor. The debtor

might well lie by, and suffer judgment to go against him by default, relying upon a deduction of the sum paid before judgment. The ground of the action is, that the defendant has received $50 of the plaintiff, which he is not entitled to retain. He might have retained it if he had chosen to indorse it on the note, or to deduct it from his damages, but not having done either, he cannot conscientiously retain it."

Fowler v. *Shearer*, (6 *Mass. Rep.* 14,) was decided upon the same principle. In that case Shearer was an attorney at law, and had received a note against the plaintiff for collection. Fowler paid him $20 to apply on the note, but without making the application, he proceeded to take judgment for the full amount of the note. Afterwards, he paid over the money to the plaintiff in the judgment. In an action against Shearer, the attorney, Fowler was allowed to recover back the money he had paid him. Parsons, Ch. J., said, "When this money was paid to the defendant, it was on the trust that he would discharge the plaintiff, either by indorsing it, or crediting it when he entered judgment. It cannot be presumed that, notwithstanding this payment, the defendant in that suit would retain counsel and call upon the present defendant as a witness to prove the payment. The defendant was guilty of a breach of the trust reposed in him by the plaintiff, and for this breach he ought to refund the money."

It is proper to notice that in a recent edition of the Massachusetts reports, the editor, in a note to the case of *Rowe* v. *Smith*, above cited, has flatly asserted that this case "cannot stand in law." The reason he assigns for an opinion so decided is, that the case allows matters embraced in a former suit, and which had passed *in rem judicatum* to be again brought in controversy. In respect to this note, it is, perhaps, enough to say, that the *editor*, however learned he may be, clearly differs in opinion with two distinguished chief justices, each of whom was sustained in his views by four associate justices. The case was decided upon the very ground that by allowing the plaintiff to recover, the judgment in the former

suit would not be disturbed. The amount of the recovery was no more than the amount of the plaintiff's debt. The thing complained of was, that the defendant had not reduced that debt by an application of the money he had received, as he ought to have done. For this omission of duty he was held liable.

The soundness of the decisions already cited was recognized in *Loring* v. *Mansfield*, (17 *Mass. Rep.* 394,) which also was an action to recover back money alleged to have been paid upon a note and not applied. The court distinguished that case from the cases cited, by the fact, that, instead of having suffered judgment to go against him by default, as in those cases, the plaintiff in this case had defended the suit against him and was present at the trial and might have been heard on the question of damages, and yet voluntarily lay by and offered no evidence of his payments. (*See also Whitcomb* v. *Williams*, 4 *Pick.* 228; *Gary* v. *Hull*, 11 *John.* 441; *Cobb* v. *Curtiss*, 8 *id.* 470; *Cowen & Hill's Notes*, 832 *to* 834.)

A contrary doctrine has been held in New Hampshire and Alabama. In *Tilton* v. *Gordon*, (1 *N. H. Rep.* 33,) the plaintiff had sold a yoke of oxen to Gordon who held a note against him, and the price of the oxen was to be credited on the note. A suit was afterwards brought on the note, and judgment obtained by default for the full amount. It was held that he could not recover the price of the oxen in a subsequent action. The court, in giving judgment, attach some importance to the fact that under the provisions of a statute of New Hampshire, the plaintiff was not remediless in the first action. *Broughton* v. *McIntosh*, (1 *Alab. Rep.* 103,) and *Mitchell* v. *Sanford*, (11 *id.* 695,) are to the same effect.

In my judgment, the good sense and justice of the question are with the Massachusetts cases. It is not enough to estop the plaintiff in the second action, that the matter upon which it is founded might have been available in the first. The ground upon which this action proceeds is, not that the judgment in the first action is wrong, but that, conceding its va-

lidity, the defendant has money in his hands which he received from the plaintiff, and which in justice he ought not to keep. He might, indeed, have made it right for him to keep the money, but he elected not to do so. He received it upon a trust and confidence that he should apply it in a specific manner. This he has not done, and it is now inequitable that he should retain it. The plaintiff had a right to expect that the defendant would perform his duty, and, when he came to take judgment for his debt, that he would credit the payments which had been made. To hold that he was bound to appear in the action and employ counsel at his own expense, merely to see that the defendant did what he had agreed to do, would, in my judgment, be unreasonable. If the defendant is now charged with the expense of another suit, it is his own fault. He might well have avoided it, by merely giving credit for the payments he had received. Unless this action is sustained, the plaintiff has lost his money, and that too, without any fault of his own.

I am of opinion that the judgment should be reversed and a new trial granted, with costs to abide the event.

[Albany General Term, December 7, 1857. *Wright*, *Gould* and *Harris*, Justices.]

26 468
25a 180

Main *vs.* Cooper.

Where an action is brought, before a justice of the peace, by the assignee of the lessor in a lease in fee, against the assignee of the lessee, to recover rent, and the defendant, in his answer, denies all the allegations in the complaint, the title to land necessarily comes in question, and the justice has no jurisdiction to render a judgment.

Where it becomes necessary for the plaintiff to establish his title, in order to recover, the objection may be taken by the defendant, that the title to land comes in question; and it is the duty of the justice, in whatever stage of the trial this shall appear, to dismiss the action.

Main *v.* Cooper.

Although in many cases between landlord and tenant, the latter is estopped from disputing the title of the former, yet where a stranger to the original transaction claims that he has succeeded to the rights of the landlord, it is competent for the tenant to deny his claim, and thus put him to the proof of his title. When this is done, whatever be the amount in controversy, the case is no longer within the jurisdiction of a justice of the peace.

THIS was an appeal from a judgment of the Rensselaer county court, affirming a justice's judgment. The action was brought to recover rent claimed to be due to the plaintiff upon a manor lease. The complaint sets forth a lease in fee from Stephen Van Rensselaer to Lawrence Snyder, bearing date the 21st day of March, 1794, for a lot of land in the town of Poestenkill, and reserving a wheat rent. It then proceeds to state facts showing, that on the first day of July, 1852, all the interest of Stephen Van Rensselaer and his heirs and assigns in the land, and the rents reserved, and the rents which had then accrued and remained unpaid, were conveyed to the plaintiff, and it is alleged that the plaintiff then "*became the owner of the rents then due and in arrear, and also became seised in fee of the said rents* and estate in the said demised premises."

The complaint further states, that the defendant had become the assignee of the interest of the grantee of the said premises in a part thereof, and that after he became such assignee, the rent upon the part of the premises of which he was the assignee, from the year 1842 to the year 1855, inclusive, had become due and was unpaid. For this rent the plaintiff claimed judgment.

The defendant, in his answer, denied each and every allegation in the complaint. Upon the trial, the plaintiff offered proof of his title. The counsel for the defendant objected to the evidence, on the ground that it involved the title to real property. The objection was overruled by the justice, and the evidence received. The defendant also asked that the action be dismissed, on the ground that, by the plaintiff's own showing, the title to real property was in question. The testimony being closed, the justice rendered judgment for the

plaintiff for $100 damages, besides costs. This judgment was affirmed by the county court, upon appeal.

R. A. Parmenter, for the plaintiff.

A. Bingham, for the defendant.

By the Court, HARRIS, J. The single question which this case presents is, whether the justice had jurisdiction to render the judgment. Such jurisdiction is denied, on the ground that the title to real property came in question upon the trial.

There are two modes in which title may come in question upon a trial. The one is, where the issue is such that *the plaintiff* finds it necessary to prove his title, in order to sustain his action. In respect to such a case, it is provided by the 59th section of the code, that "if it appear on the trial, from the plaintiff's own showing, that the title to real property is in question, and such title shall be disputed by the defendant, the justice shall dismiss the action, and render judgment against the plaintiff for costs." The other case is, where *the defendant* proposes to set up title in his defense. For this case, provision is made in the 55th and 56th sections of the code. The 58th section declares that, unless the defendant proceed in the manner prescribed in the preceding sections, the justice shall have jurisdiction of the cause, and the defendant shall be precluded, *in his defense*, from drawing the title in question. It is to be observed, that the defendant is only thus precluded from drawing title in question "in his defense." If it become necessary for the plaintiff to establish his title, in order to recover, the objection may be taken by the defendant, and it is the duty of the justice, in whatever stage of the trial this shall appear, to dismiss the action.

The case in hand was clearly within the 59th section. The rents claimed were real property. The plaintiff alleged that, by virtue of the conveyances set forth in the complaint,

he had become seised in fee of such rents. This was a material allegation, and, being denied, he was bound, before he could recover, to prove it. Thus, "by the plaintiff's own showing," the title to real property was brought in question. In principle, the case is like an action for trespass in cutting timber on wild land. In such a case, there being no possession, it is necessary for the plaintiff to prove his title, before he can recover. And for this reason, a justice cannot try such an action. (*See Hubbell* v. *Rochester*, 8 *Cowen*, 115.)

In many cases between landlord and tenant, the latter is estopped from disputing the title of the former. Where this is the case, no question of title can arise. But all there is of this rule is, that the tenant cannot dispute the title of his landlord while it remains as it was when the tenancy was created. It is always competent for the tenant to show, in any way he can, that the landlord's title has terminated since the commencement of the tenancy. So where, as in this case, a stranger to the original transaction claims that he has succeeded to the rights of the landlord, it is competent for the tenant to deny his claim, and thus put him to the proof of his title. Where this is done, whatever the amount in controversy, the case is no longer within the jurisdiction of a justice of the peace. This was such a case. The judgment, therefore, should be reversed.

[Albany General Term, December 7, 1857. *Wright, Harris* and *Gould*, Justices.]

26 479
132a 64
26 472
42 577
42k 601
49a 41
73a 254
82a 376

COMFORT *vs.* KIERSTED and others.

Where an article agreed to be sold is yet to be manufactured, the title does not pass until there has been some act on the part of the vendor which amounts to a delivery, and some act on the part of the vendee which amounts to an acceptance.

To make a sale complete, so as to vest the title in the vendee, the thing sold must not only be in existence, but it must be identified.

Where D. agreed to manufacture for K., a quantity of shingles, at a specified price per thousand, which shingles should *be the property of K. as fast as they were made; Held* that the contract conveyed no present right of property to K. in the shingles, but that, it being an agreement to be executed *in futuro*, he had only a right of action against D. for not executing the agreement.

Held also, that before the title would vest, even after the shingles were made, something must be done which would amount to at least a constructive delivery.

THIS was an appeal from a judgment of the Sullivan county court, reversing a justice's judgment. The action was brought to recover the value of 17 bunches of shingles, which had been taken by the defendants from the possession of the plaintiff. Upon the trial before the justice and a jury, the plaintiff proved that he had purchased the shingles at a constable's sale, under an execution against one *Prosper P. Davis*, by whom the shingles were manufactured. The defendant also claimed title under Davis, and gave in evidence a contract as follows: "Mongaup Valley, Jan. 1, 1856. An agreement made and concluded between Prosper P. Davis of Bethel, Sull. Co., N. Y., and W. Kiersted & Co. of the same place. The said Prosper P. Davis hereby agrees to make for W. Kiersted & Co., one hundred thousand 20 inch shingles, counting four inch wide, 500 in a bunch, of the best quality of shingles, at the price of $3 per thousand, delivered at the store, to be applied on the indebtedness of the said Davis to the said W. Kiersted & Co., with the privilege of making the amount 150,000 shingles. *The shingles to be the property of W. Kiersted & Co.*, at the price of eighteen shillings per thousand, on the premises of said Davis, *as fast as made, or whenever he makes the shingles.* The said Davis agrees to deliver

all the shingles he makes at the store of W. Kiersted & Co. by the first day of May next, for which said W. Kiersted & Co. agree to pay him $3 per thousand.

W. KIERSTED & CO.
PROSPER P. DAVIS."

The defendants proved by Davis that the shingles in question were made by him for them. The testimony being closed, the justice charged the jury, in substance, that the plaintiff was entitled to their verdict for the value of the property. A verdict was accordingly rendered in favor of the plaintiff for $19.12, upon which judgment was rendered. Upon appeal to the county court, this judgment was reversed.

J. K. Porter, for the plaintiff.

H. Hogeboom, for the defendants.

By the Court, HARRIS, J. It is not always an easy matter to determine whether a contract for the sale of goods is so far executed as to pass the title to the vendee. In respect to goods *in esse* at the time of the contract, it is a general rule that the contract of sale itself transfers the right of property to the purchaser, if the vendor has nothing more to do before delivery. (2 *Kent's Com.* 492.) But where the thing to be sold is yet to be manufactured, the title does not pass until there has been some act on the part of the vendor which amounts to a delivery, and some act on the part of the vendee which amounts to an acceptance. (*Andrews* v *Durant*, 1 *Kernan*, 40. *Newcomb* v. *Cramer*, 9 *Barb.* 402. *Johnson* v. *Hunt*, 11 *Wend.* 137. *Gregory* v. *Stryker*, 2 *Denio*, 628. *Mixer* v. *Howarth*, 21 *Pick.* 205.)

In this case, the parties to the contract had agreed that the shingles should be the property of the defendants *as fast as they were made*. Still the contract was executory. To make a sale complete, so as to vest the title in the vendee, the thing sold must not only be in existence, but it must be identified.

The contract itself conveyed no present right of property to the defendants. Though Davis agreed that the shingles he was about to make should, as fast as made, become the property of the defendants, still, as it was an agreement to be executed *in futuro*, his right was, not to the shingles, but in action for not executing the agreement. Before the title would vest, even after the shingles had been made, something must have been done which would amount at least to a constructive delivery. The shingles must have been in some way designated and set apart, so as to be capable of being identified as the property of the purchasers. (*See Lansing* v. *Turner*, 2 *John.* 13; 2 *Kent's Com.* 468; *Field* v. *Moore*, *Lalor's Sup.* 418.) Had Davis seen fit, after manufacturing the shingles, to dispose of them as his own property, instead of delivering them to the defendants in execution of his contract, it seems to me very clear that their only remedy must have been by an action for the non-performance of the contract, and not for a wrongful disposition of their goods. Suppose Davis had made, with another person, another contract, in all respects like that under consideration, whereby he had agreed to deliver the same quantity of shingles as fast as made, could it be pretended that the defendants would, by the mere operation of their contract, become the owners of all the shingles made by Davis, as soon as manufactured? It would then need, as now, that in some way the shingles should be designated as delivered in execution of the contract, in order to change the right of property. And they would then have become the property of the one or the other of the parties to whom he had agreed to sell them, according to their designation.

The county judge, in a very sensible argument to maintain his theory of the case, has supposed the destruction of the shingles by fire. The loss, in that event, would, he thinks, have fallen on the defendants, and not on Davis. If he is right in this, the case has been correctly decided, for the loss would undoubtely fall on the owner. But I cannot see that

this inquiry serves in any way to solve the question of ownership. It is still necessary to determine, from the facts in the case, whether the right of property had ever vested in the defendants. I am of opinion that it had not. The judgment of the county court should therefore be reversed, and that of the justice affirmed.

[Albany General Term, December 7, 1857. *Wright, Harris* and *Gould*, Justices.]

Noble and wife *vs.* Cromwell and others.

Any error in stating the interests and shares of the parties, in a partition suit, or any omission to state what, on motion, the plaintiff might have been compelled to insert by way of amendment, is not an irregularity which can affect the title, where the persons interested therein are all parties to the action, and are therefore concluded by the decree.

A purchaser will not be discharged because of the plaintiff's omission to allege, in his complaint, that there are no other parties in interest, or incumbrancers, than those joined; nor on account of the referee's omission to annex to his report the searches for incumbrances.

Where a testator devised an undivided interest in real estate to a husband, in trust for his wife, during her life, and at her death to her heirs, subject to a life estate in the husband, if he survived her; *Held* that, on a partition, the proceeds of the interest so devised should be brought into court and invested, the income to be paid to the wife during her life, and to her husband after her death, if he survived her, and after his death, such proceeds to go to her heirs.

And the husband and wife being plaintiffs in the partition suit, and having taken judgment that their share of the proceeds should be paid over to them, instead of being so brought into court; *Held* that this was an irregularity for which the purchaser was entitled to be discharged, unless the judgment should be amended.

PETITION by Charles Bridge, the purchaser of premises sold under a decree in partition, to be discharged from his purchase. The complaint alleged that in March, 1847, Benjamin Brooks died leaving certain real estate, which was,

by his last will and testament, devised to his several children, in nine parts. That the land was subject to a mortgage, which was afterwards foreclosed, and the premises in question, upon the sale, were bought in by, and conveyed to, C. T. Cromwell, (the husband of one of the devisees,) for the benefit and account of all the devisees, according to the provisions of the will. That Cromwell conveyed to Harriet, the wife of the plaintiff, William H. Noble, "her undivided proportion of the premises, which was ascertained to be eleven and two-thirds per cent of the premises; and that the other devisees under said will, or those who represent said devisees, are equitably entitled, in the same manner, to the same proportion or share thereof," except one of the defendants, an infant, &c. That the plaintiffs "are now seised in right of the plaintiff Harriet, as tenants in common with the defendants, of an estate in fee simple equal to eleven and two-thirds per cent, and an equitable interest for the other devisees, or their legal representatives, under and according to said will." The complaint further stated the interest claimed by the other defendants, and averred that Edward C. Bull, a party defendant, was entitled to be repaid, out of the share of the plaintiffs, an interest of $1000, and out of the share of Matilda Frye, one of the devisees, an interest of $522.50. The plaintiffs demanded judgment for an actual partition, or for a sale, and the division of the proceeds. By the will, the testator devised one share of the premises to William H. Noble, in trust for his wife, during her natural life, and to her heirs forever, subject to a life estate in the husband, after the death of his wife. The answer submitted the interests of the defendants to the court, for partition, and upon the usual reference a report was made by the referee, defining the interests of the parties. The interest of the plaintiffs was stated to be an interest, in the right of the wife, of eleven and two-thirds per cent. The referee certified that he had caused the necessary searches to be made, and that no creditor not a party had any lien on the premises,

except a mortgagee, whose lien was prior to the interests of all the parties. An abstract of the title was set forth in the report, but no searches were annexed. The report was confirmed, and judgment was given, directing a sale of the premises, and a division of the proceeds among the parties pursuant to the report; including the payment to the plaintiffs of eleven and two-thirds per cent, of the proceeds, as claimed in the complaint. The sale was had, under the direction of the referee, and his report of sale was confirmed. The petitioner was the purchaser at the sale. The present application to be discharged from his purchase was founded on objections to the regularity of the proceedings in the suit.

It appeared, upon the motion, that the action was commenced by an arrangement with one George Bridge, who had then a contract with several of the devisees, for interests amounting to fifty-one and one-third hundredths of the premises. Pending the partition suit, this contract was assigned by him to Charles Bridge, the petitioner; and before judgment, a deed, pursuant to the contract, was executed to him by some of the defendants. This deed was, by its terms, "subject to the partition action." The petitioner raised several objections to the regularity of the proceedings; among which were these: That he, the petitioner, George Bridge, and the children of the plaintiffs, should have been made plaintiffs; that the interests of the parties were not stated in the complaint with sufficient certainty; that it was not alleged that all the debts and legacies were paid, nor that there were no other incumbrancers; and that no searches for incumbrances were annexed to the report of the referee.

J. M. Baldwin, for the petitioner.

Charles T. Cromwell, defendant, in person.

INGRAHAM, J. Under a decree in partition in this case, Charles Bridge became the purchaser of certain premises in

the city of New York, which sale has not been completed; and he now moves for an order vacating the sale, for alleged irregularities in the proceedings, and for defects in the title to the premises.

The various objections taken to the proceedings, so far as they relate to the parties who appeared therein, cannot affect the title to the premises. Any error in stating the interests and shares of the parties, or any omission to state what, on motion, the plaintiffs might have been compelled to insert by way of amendment, would be immaterial, because the persons interested therein were all parties to the action, and are concluded by the decree.

So, also, the omission to allege that there were no incumbrances, and the omission to annex searches for incumbrances, to the report, would be immaterial. If there are any such incumbrances, the purchaser should furnish evidence thereof, and not rest his motion on the mere want of such certificates. (*Gardner* v. *Luke*, 12 *Wend.* 269. *Hall* v. *Partridge*, 10 *How.* 190.) The like remarks apply to the alleged want of an allegation in the complaint as to the wife of the testator; or as to when the will was proved; or that the parties were tenants in common; and others of a like nature. The omission to make these allegations does not prove that the contrary exists. If there is no foundation for any such suggestions, no harm can arise from their omission. If there be foundation for them, and liens and incumbrances, or defects, do exist, affecting the title, the petitioner can show, affirmatively, such incumbrance or defect. Not having done so, on this motion, it is fair to presume that none exist.

The property was conveyed to Bull as security, and it does not appear on the record that any reconveyance has been executed. In his answer, Bull admits his interest in the premises sought to be partitioned, to be as stated in the complaint. Having been made a party to the action, and having answered in this manner, he would be concluded by the judgment, and could not hereafter claim any other interest therein. I under-

stand it to be conceded that he has been paid the amount due him. But whether paid or not, he is concluded by the judgment, which declares that Edward C. Bull is not entitled to any interest in the premises.

The objections to the proceedings as to the infant defendants, were waived on the argument of the motion.

Some of the defendants had conveyed their shares in the property to the petitioner, before the judgment, and such change of interest is not noted in the judgment. The deeds show that such conveyances were made subject to the proceedings in partition, and were to vest in the purchaser the shares of the grantors as parties in the suit. The title could in no way be affected by such conveyances to the purchaser. By purchasing with full knowledge that he held these conveyances, he became vested with all the title of the parties to the action, as well by the sale under the judgment as by the conveyances, and he could not object, as a defect in the title, that in addition to the title acquired by the sale, he had also a title by deed from some of the parties. If he intended to claim adversely to the partition, he should not have purchased the premises at the sale under the judgment. The case of *Jackson* v. *Brown*, (3 *John.* 459,) cited by the petitioner, is not applicable, because the conveyance in that case was made before the proceedings in partition were commenced, and the grantee was not named in the proceeding.

By the will under which the parties claimed title to the premises, the testator, after dividing his property into nine parts, devised one share thereof to William H. Noble, in trust for his wife during her natural life, and to her heirs forever, subject to a life estate to the husband after the death of the wife. The title to the premises, under this devise, vested directly in the wife, and not in the trustee, during her life; (1 *R. S.* 728, § 49;) and the question is raised by the petitioner whether, after her death, the estate did not pass to the children of Mrs. Noble. Under the provisions of the revised statutes, (1 *R. S.* 748,) Mrs. Noble's children, if she left any

surviving, would be entitled to the fee, subject to the estate of the husband therein during his life, if he survived his wife. It is no answer to the objection taken by the petitioner to the title of the premises sold, in this respect, to say that there are no children shown to be in existence. It may or may not be the case at the time of her death. Until that event takes place, it is impossible to say who will be her heirs; or whether her children, if she has any, will survive her.

The difficulty, however, which arises from this view of the case may be remedied by an amendment of the judgment, directing the share of the property in which Mrs. Noble has an interest, to be brought into court and invested; the income to be paid to her during her life; to her husband, if he survive her, after her death; and to belong to the heirs of Mrs. Noble thereafter. The plaintiff should apply for an amendment of the judgment in this respect; and if so amended, the sale can be completed. The general term of the supreme court, in this district, in *Mead* v. *Mitchell*, (September term, 1857,) have decided that with such a disposition of the fund the partition is good, and a good title can be given to the purchaser. (*See S. C. at special term*, 5 *Ab. Pr. Rep.* 92.)

The motion will be granted, unless the plaintiff, within thirty days, applies for, and obtains, an order amending the judgment in this respect. If so amended, the motion is denied.

The petitioner to be paid the costs of this application, out of the fund.

[New York Special Term, January 4 1858. *Ingraham*, Justice.]

26 481
26 505
5h 457

THE PEOPLE, *ex rel.* Richard Gambling, *vs.* THE BOARD OF POLICE FOR THE METROPOLITAN POLICE DISTRICT.

The act of April 15, 1857, establishing a metropolitan police district, provided that the mode of trial of policemen and their removal from office, should be particularly defined and prescribed by the rules of the board; and that no person should be removed except upon written charges, and after an opportunity should have been afforded him of being heard in his defense. The board adopted rules, pursuant to the act, providing that charges preferred must be in writing, sworn to, &c., unless made by a member of the board, or superintendents or inspectors, and that the accused should have two days' notice to examine the charges and make answer to them, after which a trial might be had at any meeting of the board, of which the accused had been advised. *Held* that where charges against a policeman were preferred by an individual who was not a commissioner or a superintendent or inspector, notice of the charges, and of the time and place of trial, should have been given to the accused personally. And that upon charges not sworn to, and in the absence of any proof that notice was given to the accused to call and examine the charges, and upon a notice of trial, not served personally, but left at the station house, no time or place of trial being specified therein, the board had no power or authority to remove the accused.

When a statute prescribes the mode of acquiring jurisdiction, the mode pointed out must be complied with, or the decision will be a nullity.

A *certiorari* to review the proceedings of the board of police. in removing a policeman, is the appropriate remedy for the party aggrieved.

CERTIORARI, to review the decision of the board of police for the metropolitan police district, removing the relator from the office of policeman. The defendants having made their return to the certiorari, it was referred to a referee to take proof of the facts and circumstances and to report the same to the court, with his opinion thereon. From the report of the referee it appeared that on the 19th of June, 1857, William Sutherland, jun., a policeman, and acting as special aid to the deputy superintendent of the police department, caused to be served upon the relator personally, a notice in writing, requiring the relator to report himself for patrol duty, at the station house, Knickerbocker Hall, corner of 23d street and 8th avenue, at sunset of that day. That the relator did not report himself according to the requirement of said notice. That on the night of the 19th or morning

of the 20th of said month of June, he presented charges in writing against the relator and others, by which he suspended them from pay and duty on the charge of willful disobedience of orders. Specification, that on the 19th of June, they refused to report for their respective duties, as per order of that day. The referee further reported that on the 20th of June a notice in writing, directed to the relator, signed by George W. Embree, chief clerk of the said police commissioners, stating that said Sutherland had made complaint against him, Gambling, for willful disobedience of orders and insubordination, with a specification that he (Gambling) refused to obey the orders of his superior officer on the 19th day of June, 1857, was made out and given among many other notices, to Stephen John, a patrolman, to be served; that said John did not serve the same upon the said Gambling personally, but left the said notice with captain John D. McKee, who had been appointed captain of the 16th precinct, by the former police commissioners, and was then acting as such officer, under whose command the said Gambling then was. That said Captain McKee refused to recognize the metropolitan police commissioners as a legally constituted body, and for that reason did not deliver said notice to Gambling, the relator. That said Gambling did not report himself to the superintendent of the metropolitan police commissioners for duty as a patrolman, until after the 23d day of June last. That said Gambling had been ill and off duty, from about the 1st day of April, until after the 23d day of June, 1857. That the only rules and regulations adopted by the metropolitan police commissioners, which relate to the subject of charges against members of the police and notices of such charges and trial, are the sixth and seventh rules, which are as follows: 6th. * * * "Charges preferred against any member of the police force must be in writing, and sworn to or affirmed to, with the name and residence of the complainant, and if stated on information or belief, then the source of such information, and the reason of such belief, shall also be stated. But this shall not apply to

complaints or charges by any commissioner, or the general or deputy superintendents or inspectors, who may charge simply in writing. All such charges must be filed with the chief clerk." 7th. "When charges are filed, the chief clerk shall notify the person complained of to call and examine the same; and the person complained of, within two days thereafter, must either dictate answers thereto to the chief clerk, to be by him taken down, or he may prepare the same in writing within the same time and file them. The trial thereof shall be in order at any subsequent meeting of the board, of which the person complained of shall be advised. But the person complained of may waive such trial, and submit his case, and answer upon affidavits, after two days' notice has been given by the chief clerk to the complainant of such waiver, and opportunity within such time, for such complainant to produce witnesses for deposition before such chief clerk, or to furnish affidavits otherwise in support of this complaint."

Upon the charges thus presented, the relator was dismissed and removed from office by the commissioners, by an order indorsed on the back of the charges, and signed by them.

Luman Sherwood and *Gilbert Dean*, for the relator.

D. D. Field, and *Wm. Curtis Noyes*, for the defendants.

By the Court, DAVIES, P. J. The return to the writ of certiorari in these cases and others, brings up the question whether the relators have been legally dismissed as policemen of the city of New York. They were duly and legally appointed under the act of April 13, 1853. (*Laws of* 1853, *ch.* 228.) By section 2 of article 3 of that act, it was declared that the members of the police department, appointed after this act shall have gone into effect, shall hold their offices during good behavior, and shall only be removed for cause as hereinafter provided." Section 4 of the same article prescribes the mode of removal. Notice to the accused was to be

given, to afford him an opportunity to be heard in his defense. The accused party might in all cases appear by counsel, and compel the attendance of witnesses in his behalf. The commissioners were to examine witnesses under oath, and the testimony in such case was to be reduced to writing, and the decision filed with the common council.

The act of April 15, 1857, (*Laws of* 1857, *ch.* 569,) established a metropolitan police district, and provided for the government thereof. By this act a board of commissioners were appointed, who were to have the government and management of the police within the district. The quota of patrol force for the county of New York was to be the number of patrolmen then existing by law in the city of New York. Section 7 of this act declares that the qualifications, enumerative and distributive, of duties, *mode of trial*, and removal from office, of each officer of the police force, shall be particularly defined and prescribed by rules and regulations of the board of police; and that no person shall be removed therefrom except upon written charges preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defense. Section 32 of this act declares that the police of the city of New York, after the first meeting of the board of police, (which was on April 23, 1857,) should hold office and do duty under the provisions of that act, "and as members of the police force of the metropolitan district hereby constituted."

In pursuance of the authority thus conferred, the board of police adopted rules and regulations relating to the mode of trial and removal from office of members of the police force. Rule sixth provides that charges preferred against any members of the police force must be in writing, and sworn to or affirmed to, with the name and residence of the complainant. If stated to be on information and belief, then the source of such information, and the reason of such belief, shall also be stated. But this was not to apply when charges were preferred by any commissioner, or the general or deputy superintendents

or inspectors, who might charge simply in writing. All such charges must be filed with the chief clerk. Rule seventh prescribes that when charges are filed, the chief clerk shall notify the person complained of, to call and examine the same, and the person complained of, within two days thereafter, must either dictate answers thereto to the chief clerk, to be by him taken down, or he may prepare the same in writing, within the same time, and file them. The trial thereof shall be in order at any subsequent meeting of the board, of which the person complained of shall be advised.

In the cases before us, the charges were in no instance preferred by a commissioner, or by a general or deputy superintendent, or by an inspector; and the charges in no instance were sworn or affirmed to. There is no evidence that any notice was given to any of the relators to call and examine the charges preferred, or that they had any opportunity for such examination. Notice of trial, on charges, was left at the station houses of the various wards, but no time or place of trial was specified therein; and there is no evidence that knowledge of such time and place, or of such charges, ever came to the relators.

For the reasons given by Justice Davies in the case of McDermott against these defendants,(*a*) we are of the opinion that notice of such charges, and of the time and place of trial, should have been given to the relators personally, so that they might have had an opportunity of being heard in their defense.

When a statute prescribes the mode of acquiring jurisdiction, the mode pointed out must be complied with, or the proceeding will be a nullity. (*Bloom* v. *Burdick*, 1 *Hill*, 130. *Stanton* v. *Ellis*, 2 *Ker.* 575.)

Notice of the charges preferred against the relators, and notice of the time and place of trial thereon, not having been given to them in conformity to law, the defendants had no ju-

(*a*) 25 Barb. 635. 5 Ab. 422.

risdiction over them, and their order of removal, depriving them of the office of policemen, was unauthorized, and cannot be maintained. The office of policeman, as created by the act of 1853, and continued by that of 1857, is not a political office, subject to change and removal, at the will of the appointing power. The commissioners of police under the act of 1853, as well as the defendants under the act of 1857, in proceeding to the trial and removal of policemen, act in a quasi judicial capacity. The reasons or causes of removal are not subjects of review. If they have jurisdiction, the motives of their action, or the sufficiency of the causes for removal, are not to be questioned here.

That a certiorari to review these proceedings is the proper and appropriate remedy, admits, we think, of no serious question. It lies to review the proceedings of canal appraisers who have appraised the damages of an individual without giving him an opportunity to be heard, or to produce testimony. (*Fonda* v. *Canal Appraisers*, 1 *Wend.* 288.) It also lies to review the proceedings of courts martial. (*Rathbun* v. *Sawyer*, 15 *Wend.* 451.) It was granted, and proceedings before a special officer set aside, on the ground that he had not acquired jurisdiction, in the case of *The People* v. *Reed*, (5 *Denio*, 554.) And this court, in the *Matter of Bruni*, (1 *Barb.* 193,) set aside the proceedings had before a justice, on the ground of want of jurisdiction.

We are therefore of opinion that the proceedings had by the defendants for the removal and dismissal of the relators, as policemen, are void for want of jurisdiction, and should be set aside.

[New York General Term, February 1, 1858. *Davies, Clerke* and *Sutherland*, Justices.]

26 487
19a 188

THE PEOPLE, *ex rel.* James McCune, *vs.* THE BOARD OF POLICE FOR THE METROPOLITAN POLICE DISTRICT.

The legislature, by the Metropolitan Police Act of April 15, 1857, intended to continue the then existing police in office, by virtue of their appointment under the act of April 13, 1853; and such policemen became, by the mere operation of the act of April, 1857, members of the metropolitan police.

And where a policeman, thus continued in office by the Metropolitan Police Act, although he refused to act under the new board of police, deeming the act of April, 1857, unconstitutional; and was unwilling and refused to act under it "until the courts should declare it constitutional," yet he continued to obey all general orders of the commissioners under the act of 1853, and, together with others acting with him, constituted the only police force of the 14th ward or precinct up to the 1st of July, 1857; *Held* that this conduct did not amount to a *resignation* of his office, but that he continued to be a member of the metropolitan police force.

Held also, that even if these acts of contumacy and refusal to act under the new organization were in themselves sufficient to constitute an intention to resign, the fact that the board of police, after the commission of such acts by the policeman, had recognized him as a member of the force, by instituting proceedings to have him dismissed for disobedience of orders, &c., and by adopting a resolution, on the 9th of October, 1857, declaring that such of the old force as had not been dismissed in conformity to law, were members of the metropolitan police, entitled to do duty, and to be paid as such, was proof that the resignation was never accepted by the board.

In order to constitute a resignation of an office, if there is no formal resignation there must be some conduct on the part of the incumbent which is actually inconsistent with the retention of the office, and a formal acceptance of the resignation, or the appointment of another in his place, by the proper authority.

Where, on the 23d of June, 1857, charges were preferred against the relator, a member of the metropolitan police, for disobedience of orders, and after proceedings were had thereon which were not in conformity with the 7th section of the Metropolitan Police Act, the board of police, on the 26th of the same month, without any formal notice to the relator, proceeded to dismiss and remove him from his office, and on the same day caused a notice of such dismissal and removal to be sent to the relator, which was never received by him; *Held* that the relator was not legally dismissed from his office; and that the proceedings had, for his removal, constituted no obstacle to the relief sought, by mandamus directing the board to restore him to pay and duty.

A person resigning an office, and manifesting the resignation by an unequivocal act, may retract or withdraw it, before the same is accepted, or any act is done to fill the place thus made vacant.

The People *v.* The Board of Police, &c.

APPLICATION for a mandamus, to compel the board of police for the metropolitan police district to restore the relator to the office of patrolman, and to his pay as such. The application was resisted, on the ground that the relator was not a member of the police force. The facts in the case were found by a special verdict, and are detailed in the opinions which follow.

J. C. Devereux and *A. R. Dyett*, for the relator. I. The relator became, by operation of law, a member of the metropolitan police. (*Act of April* 15, 1857, *sections* 6, 7, 32, 33.)

II. Up to May 25, he had not resigned his place, refused to take or hold office, or publicly withdrawn from office as a policeman under the new act or the new board of police. (1.) The act of April 15, 1857, did not create a new police force for this city. It expressly continued the old force, with nearly the same powers and duties, but under a new direction, giving that direction the power to add to the number of the force only as allowed by the supervisors. (2.) Its repealing clause (§ 35) was contingent. It in terms repeals "all statutes," &c., "inconsistent with the provisions" of the act, and would have shared its fate had the act been declared unconstitutional. In that event the act was a dead letter; consequently the police law of April 13, 1853, is still in force and effect, and the new board "intruders and usurpers." (3.) The point in dispute, then, was as to which board had, by law, direction of the force. This was not *adjudged* till May 25, when the decision was rendered at general term. The appeal had been taken from an order at special term entered *pro forma*. (4.) Up to that date the relator continued to do regular patrol duty as an officer of the only police force in the ward. He was first notified June 18, as alleged by respondents, to report under the new act. Till the decision of general term, at least, he was a policeman under the metropolitan

police act, and had not resigned, withdrawn from or refused office.

III. The relator did not, after May 25, resign his place, refuse to take or hold office, or withdraw from office, under the new act or new board of police. (1.) He did not resign. He, in fact, was in the actual performance of patrol duty till July 3, and subsequently reported himself, and has since continually held himself in readiness for duty under the new board. No intention to resign his office of policeman is shown, and none can be inferred from any act of the relator. His hesitation related not to the office, or his authority as an officer, but to the authority of other officers under the new act. Resignation of office is the act of giving up, giving back or surrendering office, or a charge, in a *formal* manner. The intention must be explicitly made known. (2.) He did not refuse to accept office. The law conferred it upon him, April 15, 1857. The act of that date (§ 32) did not tender office to members of the old force, or leave them at liberty to become invested with it or not; but in terms continued them in office from the old under the new act. The old force did not cease to exist, or renew its existence, but continued on the same under the new act. There has been no time since April 15, when the new board could tender office to the relator, or the relator accept office from them, except since his alleged dismissal, June 26th, assuming that it was legally made, and at that date separated him from the police force. Acceptance necessarily presupposes the offer of something. (3.) He did not withdraw from office as patrolman of the new force. There was no withdrawal *in fact* on his part. An intention on the part of the relator to withdraw is not shown, and none is to be inferred, as a legal consequence, from his course subsequent to April 15. As an individual officer, he received no summons or notice of any sort from the new board. He was not even aware that his captain had been dismissed. The relator is to be held legally responsible only for his own acts, not for those of the old board of police, or

of its members, or for the conduct of the old force in the aggregate, except as he is shown to have assented to it.

IV. The rank and file of the old force is not to be held accountable for conduct those in authority saw fit to pursue, prior to July 3, as to the new act and new board of police, to which conduct they were not a party. As subordinates, they had no part in the official action of their superiors, the old commissioners and others, to originate or promote it, except merely so far as they acceded to the prudential purpose of maintaining their then organization *in statu quo*, till the constitutionality of the new police act had been ascertained.

V. The position of the old force, prior to July 3d, was provisional merely, and excusable. (1.) It was provisional. The old and new boards of police mutually disputed each other's right to govern and direct the force. The controversy was in actual litigation. All those whom subordinate members of the force had been accustomed to obey and adhere to—as the old commissioners, the chief of police, their immediate captains and officers; likewise the mayors of New York and Brooklyn, the common councils and officials generally of both cities, and the most eminent judges and counsel, favored with confidence the opinion that the new act was unconstitutional, and therefore a dead letter on the statute book. With such examples and advice, the subordinate officers naturally hesitated. At length, coerced on both sides, they assumed a position as nearly that of neutrality as was allowed them. Without deserting their officers, or interfering with the new board, they continued as they were, in the quiet performance of their duties, but only provisionally, pending the litigation. (2.) They acted under a species of *moral duress*. For that reason their action cannot be regarded as voluntary. They were constrained to assume their position. They did so after hesitation and unwillingly. A loss of employment and livelihood threatened them.

VI. The position of the old police was not that of rebellion to law. No opposition was at any time offered by it to the

organization or subsequent action of the new board of police. That force was a party to no tumults or disorder, but promoted good order and police in our city. When and as soon as the court of last resort pronounced, the old force yielded its ready assent to the judgment.

VII. The maxim *ignorantia juris non excusat* has no application to the provisional attitude of the old force, prior to July 3d. It was not a case of either ignorance or knowledge, but one of *mistake of the law.* (1.) That maxim, in its proper sense, is indeed a rule of legal and social policy, "without which crime could not be punished or wrong redressed;" but the very idea of *excuse* implies delinquency, and hence the maxim may be invoked only where crime has been committed, wrong done, or a duty neglected. It is a perversion both of its language and spirit, to apply it to one who has done no wrong, &c. (2.) There is a clear and practical distinction between *ignorance* and *mistake* of the law. The former implies passiveness; does not pretend to knowledge; may be the result of laches, which is criminal; is not susceptible of proof, as proof cannot reach the convictions of the mind undeveloped in action, and for that reason courts cannot relieve against it. Mistake in law, on the other hand, is generally as susceptible of proof as mistakes in a matter of fact. No one obtains credit for the pretense of being mistaken in relation to the general rules of property and common honesty, which he is necessarily taught by his intercourse with society. But every one does not understand the subtle and intricate distinctions of law. Lawyers are the professional advisers of the community. When the client is misled by them to make a contract, *or do an act against his interest*, the mistake is susceptible of proof. What higher evidence can there be of the fact of mistake than its development in overt acts? "An actual mistake of the law, made with reference to the law itself, is distinguished from negative inattention. It is the difference between delusion and ignorance." (3.) Relief is given where the mistake is clearly one of law.

This doctrine is well established, and of application not merely to matters of contract. If a man, without any other motive or consideration than an erroneous opinion respecting his legal rights and obligations, releases a right, or undertakes to do any act, he is entitled to relief equally as if he had acted under a mistake of fact. Money paid for duties not imposed by law, with a knowledge of the facts, but under a mistake of the law—the party paying having the law in contemplation, and in good faith meaning to conform to it, but acting under a misconstruction, as ascertained by subsequent decisions—may be recovered back, as having been paid under the influence of the mistake. Its detention could be excused only on the ground of positive law. As a general rule, the same principle which furnishes a protection from loss, supplies also the remedy for a wrong, or the recovery of a right. The presumption is not, in any case, against a party acting in mistake of the law. (*Moses* v. *Macfarlane*, (*Ld. Mansfield,*) 2 *Burr.* 1002. *Farmer* v. *Arundel*, 2 *Wm. Black.* 825. *Bize* v. *Dickason*, 1 *T. R.* 287. *Hunt* v. *Rousmanier*, 8 *Wheat.* 215. 1 *Peters*, 1, 17. *Culbreath* v. *Culbreath*, 7 *Geo. R.* 70. *Lowndes* v. *Chisholm*, 2 *McCord's C. R.* 455. *Northrop* v. *Graves*, 19 *Conn. R.* 554. *Fitzgerald* v. *Peck*, 4 *Litt. R.* (*Kentucky,*) 125. *Underwood* v. *Brockman*, 4 *Dana's R.* 309. *Sturges et al.* v. *United States*, *Devereux's Court of Claims R.* 244, *and cases there cited.*)

VIII. The respondents, by their action in entertaining charges against the relator, June 18th, as a member of the metropolitan police force, subsequently trying him upon those charges and sentencing him, upon June 26th, thereon, to dismissal from his office as a member of such force, are precluded or estopped from availing themselves of clauses 1st and 2d of their return. Such acts were an acknowledgment that the relator was, on and after June 18th, a member of the metropolitan police under them, the respondents. (*Dezell* v. *Odell*, 3 *Hill*, 215.)

IX. Also, by their resolutions of Oct. 9, the respondents

are precluded from availing themselves of said clauses 1st and 2d of their return. Those resolutions were a condonation or act of forgiveness, and also an acknowledgment in terms, that members of the old force dismissed were, at the time of their alleged dismissals, upon the metropolitan police. The wording of the resolution does not admit of construction; its import, also, is too plain and obvious for that. Therefore, the subsequent resolution, of Dec. 2, rescinds or varies the former resolution, but does not affect its value or effect as a condonation and acknowledgment in favor of the old force.

X. The relator did not, at any time, take office or act under the ordinance of the common council of the city of New York, of June 2, 1857, for a day and night watch. The old force never in fact mustered under it, or became connected with it in any way or shape. There was nothing done under it. It was a dead letter, as the common council had no right to enact it. That ordinance was never enforced. No one could legally take office under it.

XI. The relator was not legally dismissed. To be legal, the dismissal should have been in accordance with the act of April 15, 1857, and the rules and regulations of the board, which were adopted under § 7 of the said the Metropolitan Police Act, and consequently have the effect of law. (1.) The charges were not duly made. They were not made to the board. They were not sworn to. The relator is not named in them. (2.) The trial was not duly conducted. Notice, as required by rule 7, to call and examine the charges, was omitted. The relator had no notice of trial, nor was an opportunity afforded him of being heard in his defense. The matter of the relator's removal was not heard at a regular meeting of the board. The sentence was not duly entered in the minutes, as required by rule 11, or a duplicate thereof served upon the relator.

XII. The relator was not so notified, tried and sentenced to dismissal for the purpose, as alleged, of making and procuring record evidence of his separation from the police force of

the metropolitan police district. Those proceedings were solely for the purpose of dismissing him as a member of such force.

XIII. There is no such thing as a "pay-roll of the metropolitan police." It is not required by the act, or said rules and regulations of the board.

XIV. On April 22, 1857, the respondents entered on their duties, and assumed control of the police force, including the relator. From thence they had full and exclusive jurisdiction, without appeal, of every class of offenses by members of the force. (1.) The act gives them a discretion as to the "cause" of removal. In that respect their duties are *quasi judicial.* (2.) The provision of the act, (§ 7,) that "no one shall be removed" from the force "except upon written charges," and after an opportunity shall have been afforded him of being heard in his defense," relates to respondents in a ministerial capacity solely. The giving such notice of trial is a ministerial act, and therefore the neglect of it subject to correction by mandamus. (3.) This court has not jurisdiction to determine whether the alleged offense of the relator was, in fact or law, a resignation of or withdrawal from office, or cause of removal therefrom.

A. J. Vanderpoel, Wm. Curtis Noyes and *D. D. Field,* for the defendants. I. The claim of the relator is resisted, upon the ground that he is not a member of the police. If he be not a member, it is clear that he is not entitled to act as a policeman, or to be paid as one. The board place their denial upon these grounds: (1.) That upon the organization of the metropolitan police, the relator did not become a member of it. His consent was necessary to the transfer from the city to the district police. That consent was not given, and therefore he never became a member. (2.) That if he did, by operation of the law, and without any previous consent, become *eo instanti* a member of the new force, he withdrew from it. His acts and his declarations show his election to

adhere to the old organization, and to array himself against the new order of things. (3.) That if he became a member, he was removed by the board.

II. The act of April 15, 1857, establishing a metropolitan police, undoubtedly intended to place the municipal police in the ranks of the metropolitan police, if they were willing to be placed there; but it did not transfer them against their will. It may be doubted, indeed, whether the legislature could do so. The office of metropolitan policeman is very different from that of municipal policeman. One is confined to New York, the other may be sent into any part of the four counties. Neither an office, nor a charter, or franchise, can, under our system, be forced upon one against his will. The only part of the new act which affects the question of the continuance of the old force, is the latter part of § 32: "The police of the city of New York shall continue to do duty under existing laws, until the first meeting of the board of police, when the said police shall hold office and do duty under the provisions of this act, and as members of the police force of the metropolitan police district hereby constituted." This should be read as if the words, if they wish to continue in office, were inserted after the word police.

III. But whether the legislature could do this or not, and whether without any manifestation of intention one way or the other, the old police were incorporated into the new, it would seem quite clear that they were not required to remain against their will. The 12th section shows that a policeman's right to withdraw or resign, was not intended to be taken from him. The 6th section shows, also, that the board had a right to dismiss from the service without a trial; for, on a reduction of the number by the supervisors, the board must of necessity designate who are to be dropped. Therefore, whether on the instant when the board was organized, and before signifying their election to accept the new act by doing something under it, the municipal police became members of the metropolitan police, it seems clear that, if they did on the

instant become such members, they could still withdraw, or resign. They could do so without notice, and by acts as well as words. Accepting an incompatible office was always held to be an election not to continue in a former one. (2 *Hill*, 92.) Resignations need never to have been in writing, unless especially so required by statute. (1 *R. S.* 122. 3 *Hill*, 243. 11 *Barb.* 90.) Here the relator's intention was manifested by unequivocal acts.

IV. If the relator, notwithstanding all that he said and did, nevertheless became and continued a member of the metropolitan police, he was removed by the board. There is an order of removal regular on its face. The board had the power to remove. They here intended to exercise the power. If they had not done so, it was because of the want of one of two prerequisites—one, a charge on oath; and the other, service of notice of trial. But there was no defect in either. The charge was by an acting inspector, and the notice was sufficiently served. (1.) It was left at the place of residence and business of the relator with his superior officer. (2.) The conspiring between the relator and his superior officer prevented personal service. The relator cannot thus take advantage of his own wrong. (11 *Pick.* 7.)

CLERKE, J. The relator was duly appointed and sworn in, as a policeman, pursuant to the act passed April 13, 1853, entitled "An act in relation to the police department in the city of New York;" thereupon he received his warrant as a member of the said police; which was in due form, and was signed by the then existing commissioners of police. In conformity with this appointment he continued to perform duty as a policeman under the said act, attached to the 14th ward patrol district, until the act passed April 15, 1857, entitled "An act to establish a metropolitan police district, and to provide for the government thereof," went into effect. The relator acted under the orders of Daniel Kissner, who was in command of the said patrol district, from the time he became a

member of the police until the said 15th of April, 1857, and continued to act under the same orders and in the same district, until July 3d, 1857.

The relator, following the example, and obeying the commands, of Kissner, his captain, did not recognize the metropolitan board of police, and refused to act under them, continuing to obey all general orders that issued from the commissioners under the act of 1853. Kissner and the relator, deeming the act of 1857 unconstitutional, refused to act under it, until the courts should declare it constitutional. They considered the act of 1853 still in force, and claimed to act under it, until the 3d of July, 1857.

The members of the old force, under the command of Kissner, including the relator, performed the police duty of the 14th ward until the last day of June, or 1st of July, 1857, and constituted the only police force on duty in that ward. The relator has performed no duty as a policeman since July 3d, 1857; but since that time has reported himself for duty, and has held himself in readiness for duty, as a member of the metropolitan police force. He received his pay from the comptroller of the city of New York to June 26th, 1857.

About said 26th of June, 1857, after the organization of the metropolitan police force, proceedings were instituted against the relator on the complaint of Sergeant Williamson, who, under the new organization, had the command of the 14th precinct, comprising, if not identical with, the district to which the relator had been assigned for duty under the late organization. He was accused in this complaint before the new board, of willful disobedience of orders, and insubordination; and the board taking cognizance of the charge, dismissed him, together with several other patrolmen, from the service of the department, for similar alleged delinquencies. The question arising on this state of facts is, whether the relator was a member of the metropolitan police force on the 11th of December, 1857, when the writ of alternative mandamus was issued in this case; and, in order to answer this question

correctly, it will be necessary to consider in the first place, whether the police, appointed under the act of 1853, became by the mere operation of the act of 1857, members of the metropolitan police force; and secondly, if they did, do the acts of contumacy and refusal to act under the new organization until the 3d of July, 1857, amount to a resignation, on the part of the relator, of his membership in the new force; and thirdly, if they do not amount to this, but merely constitute acts of disobedience and insubordination, has he been dismissed in the proper way, and by the proper authority, from the service of the department.

I. Did the police, appointed under the act of 1853, become by the mere operation of the act of 1857, members of the metropolitan police? The 32d section of the new act provides that "the police in the cities of New York and Brooklyn, officers and patrolmen, shall continue to do duty under existing laws at the passage of this act, and, according to the regulations of the departments of New York and Brooklyn, until after the first meeting of the board of police, under this act; when the said police shall hold office and do duty under the provisions of the act hereby enacted, and as members of the police force of 'the metropolitan police district' hereby constituted." This act contains no provision requiring any affirmative action or specific course of conduct on the part of the members of the old force, to qualify them for duty and membership under the new. They are to *continue* to do duty under existing laws; and after the first meeting of the new board of police, they shall hold office and do duty under the provisions of the new act. This is all. There is no interruption for an instant in their capacity to exercise duties as police. The act, as we have seen, was passed on the 15th of April, 1857; it went into effect *immediately;* and the police were as effectually in possession of all the powers of their office the instant of the passage of the act, as the instant before. The new act does not enumerate the specific powers and duties of patrolmen: these are contained in the act of 1853, which,

to a certain extent, remains in force. It is a mistake to suppose that that act is absolutely expunged from the statute book, for it is only those parts and provisions of it, which are inconsistent with the new act that are repealed. The powers and duties, then, prescribed by the act of 1853, or any other law, are continued by the new act; and the officers and patrolmen are expressly authorized to exercise and perform them; and being thus authorized, without the intervention of any new appointment, without the requirement of any new or additional qualification, and without any abeyance or restriction whatever, they are transferred to the new organization, and are declared to be members of it.

It is plain to my mind, from these considerations, that in changing the organization of the police in some respects, and in providing for it a new governing and superintending body, and in extending the territorial sphere of its duties, the legislature never contemplated the creation of a new force; but, on the contrary, they deliberately intended the continuation in office of the men who composed the old police. They, indeed, required by section 33 that its members should possess certain specific qualifications, recited in section 7, not absolutely declared indispensable by any previous act; but, the language of section 33, requiring the possession of these qualifications, shows, distinctly, that nothing additional to what was before required was necessary to make the members of the old force, by the operation of the statute, members of the new; for it says "the board of police shall *remove* from office any one of the present members of the police departments of New York and Brooklyn, not possessed of the qualifications set forth in section seven of this act." They certainly could not be removed from office, for the want of these qualifications, unless they continued in office, whether they possessed them or not. The new act, therefore, did not vacate or abolish the office of the existing police, but, only rendered them liable to be removed, if it should be ascertained, by the new

board, that they did not possess the qualifications prescribed in section seven.

If they did not intend that the members of the old police should be continued in office, by force of the old appointment, the only alternative, then, is to suppose that they designed the creation of a new force; they (the legislature) appointing the members of the old force members of the new, and thus, of course, requiring some affirmative action on the part of those members, to signify their acceptance of the new office, such as being sworn in, &c. But are we to presume that the legislature usurped an authority, which the constitution has not conferred on them? The legislature are invested only with power *to make laws*, except in a few specific cases. It is doubtful, whether, under the present constitution, they have power to make any appointments to office, except to select their own officers and servants, and to choose senators to the senate of the United States—a duty imposed on them by the federal constitution. In certain cases (*see art.* 10, § 2 *of the state constitution*) they may *direct* the manner in which certain officers may be elected or appointed; but they, themselves, have no authority to elect or appoint. They have no more right to do this than to assume executive or judicial functions, and like the long parliament in the time of the commonwealth in England, or the national convention of the first revolution in France, absorb the whole powers of government, now happily partitioned into three distinct and co-ordinate branches, equal in power and dignity within their respective spheres. It is, therefore, manifest that the legislature, by the act of 1857, intended to continue the then existing police in office, by virtue of their appointment under the act of 1853.

It remains for us to consider whether, being in office after the passage of the act of April 15, 1857, they either duly resigned, or were duly dismissed; for, in no other way could their places be deemed vacant, except by the intervention of death.

II. Did they duly resign? I use the word resign synony-

mously with "withdraw." In section 12 of the act of 1857, they are used as equivalents. This section provides that "no member of the police force shall *withdraw* or resign from the force, unless he shall have given one month's notice thereof in writing, &c." So that, in this act, the word "withdraw" has not the meaning given to it by Lord Somers, in his speech delivered in 1688, when King James the 2d vacated the throne. In that speech he makes it equivalent to *desert*, "which in the common acceptance, both of the common and canon law, doth signify only a *bare withdrawing, a temporary quitting of a thing*, and neglect only; which leaveth the party at liberty of returning to it again." If the relator has only *withdrawn*, in this sense, he is not, on this ground, yet out of office—he has quitted it only temporarily; but it is very different if he has *resigned*. Did the relator then resign? I do not think that a formal notification of an intention to abdicate an office is necessary to constitute a legal resignation. Lord Somers, on the important occasion to which I have referred, says: "The word *abdicate* doth naturally and properly signify entirely to renounce, throw off, disown, relinquish any thing or person, so as to have no further to do with it; and that whether it be done by express words, or in writing, or *by doing such acts as are inconsistent with the holding and retaining of the thing.*" And to prove that it is sufficient, in order to constitute abdication or resignation, to do an act inconsistent with the retaining of it, though there has been nothing of express renunciation, he quotes from *Calvin*, from *Grotius, De Jure Belli et Pacis, lib.* 2, c. 4, § 4, *Lexicon Juridicum*, and from other jurists. But, nevertheless, whatever may be the manner by which the incumbent of an office indicates his intention of resigning or abdicating it, whether by acts inconsistent with the retention of the office, or by a formal renunciation of it, it is never consummated—he is never legally out of office—until his resignation is accepted, either expressly or by the appointment of another in his place. Otherwise an unworthy person, guilty

of the most flagrant violation of his duty, could, by a voluntary resignation, in many cases escape a trial, and the deserved ignominy of a dismissal. In the case of *Rex* v. *The Mayor of Ripon*, (4 *Salk.* 433,) the mere declaration, by an alderman, that he would hold the place no longer, was a good resignation, only because the corporation accepted it, and chose another in his place; and, until such election, it was declared that he had power to waive his resignation, but not afterwards. An ecclesiastical office must be resigned by the incumbent, to his superior, as a parson to the bishop, a bishop to the archbishop, an archbishop to the king, as supreme ordinary. And it is entirely in the discretion of the authority to whom the resignation should be made, either to accept or refuse it. "As the law has declared him the proper person to whom it ought to be made, it has likewise empowered him to judge thereof." (*Cro. Jac.* 64, 198.) With regard to the abdication of King James the 2d, it was held, in fact by most lawyers, that the throne was not legally vacated; it was contended by many, that it was a mere *desertion;* but by others his withdrawal from the kingdom was considered an act inconsistent with his retention of the high office; and parliament, by declaring the throne vacant, accepted this constructive resignation. But the truth is, it was not necessary—it was supererogatory at such a juncture—to consider its legality. The expulsion of King James, and the appointment of King William in his place, were not legal, but revolutionary events.

We thus perceive that in order to constitute a resignation, if there is no formal resignation, there must be some conduct on the part of the incumbent actually inconsistent with the retention of the office, and a formal acceptance of the resignation, or the appointment of another in his stead, by the proper authority.

It is not pretended that the relator presented a formal resignation. Did he commit any act inconsistent with his retention of the office?

He refused to act under the new board, but "continued to obey all general orders of the commissioners under the act of 1853." He deemed the act of April 15, 1857, unconstitutional, and was unwilling and refused to act under it, "*until the courts should declare it constitutional.*" This was a very mistaken course of conduct, undoubtedly; it was contumacious and disorganizing, and in every respect highly reprehensible. But it is evident that the relator, nevertheless, never contemplated the abdication of his office. He continued to act as policeman; he, with others pursuing the same course of conduct, were the only persons who composed the police force of the 14th ward or precinct; and he and they distinctly stated that they only refused to act, "under the new board," until the courts should declare in favor of the new act. This was not even a desertion of the office, but a continuance of it; a continuance, to be sure, marked with disobedience to legitimate superiors, distrusting, if not ignoring their authority. But it would be offering violence to language, and to the legal signification of the word, to call his conduct a *resignation.* We have seen that in order to make a resignation complete, an acceptance of it, in some form, is indispensable. But even if those acts of the relator were in themselves sufficient to constitute an intention to resign, the defendants, so far from accepting his resignation, after the commission of those acts, recognized the relator as a member of the force. On the 23d of June, 1857, they instituted proceedings in order to have him dismissed, on the ground of disobedience to orders, and for insubordination, and on October 9, 1857, resolved that such of the old force as had not been dismissed, in conformity to law, were declared to be members of the metropolitan police, entitled to do duty, and to be paid as such; and although this resolution was afterwards rescinded, its effect as a recognition of the relator at the time it was adopted, is not impaired. It still remains a positive proof that the conduct of the relator, if ever amounting to a resignation, was never accepted, as such, by the defendants.

The relator remains, by the operation of the act of 1857, a member of the police, and never having done any thing, which constituted a legal resignation, and the defendants never having done any thing which amounted to an acceptance of his resignation, if he had resigned, the only remaining question is,

III. Was he legally dismissed? The circumstances relating to the dismissal in this case are so similar to those presented in the matter of Richard Gambling, that it is unnecessary to prolong this inquiry by any minute examination of this point. It is enough, briefly to state that the proceedings were not in conformity with the 7th section of the new act, and the rules and regulations of the board. The charges were not duly made; the relator never received notice of trial; and, consequently, an opportunity was never afforded to him of being heard in his defense.

We therefore unanimously agree that the judgment below should be reversed, and that there should be judgment for the plaintiff.

DAVIES, P. J. The relator claiming to be a policeman of the metropolitan police district, prosecutes this writ to be restored to the office of patrolman, alleging that the defendants, without just cause, have deprived and continue to deprive him of that office.

The facts found by the special verdict, important to be considered are, that the relator was appointed a policeman under the act of 1853, took the oath of office and was acting as such policeman at the time of the passage of the act of April, 1857. That he did not, prior to July 3, 1857, recognize the defendants as having control of the police force, and refused to act under them prior to that date, but continued to obey the general orders emanating from the commissioners of police, under the act of April, 1853. That he was of the opinion that the act of April, 1853, continued in force, and claimed to act under it till July 3, 1857. That David Kissner was captain of the police of the 14th ward at the time of the re-

lators appointment, and that he continued to act under him till July 3, 1857, when he was first informed that Kissner had been removed by the defendants as such captain, and that on that day he reported himself for duty to the defendants, and has held himself in readiness ever since for duty as a member of the metropolitan police force; that the relator did duty as a policeman under the command of Captain Kissner, up to July 1, 1857, and that he and those acting with him were the only police force on duty in the 14th ward up to that time; that on the 23d of June, 1857, charges for disobedience of orders were preferred to the defendants against the relator, and on the 26th of June, 1857, the defendants, without any personal notice to the relator, proceeded to dismiss and remove him from the department, and on the same day notice of such dismissal and removal was sent to the relator by the chief clerk of the defendants, but was never received by him.

We have disposed of the question of the validity of the proceedings of the defendants, for the removal and dismissal of the relator, in the case of *Gambling and others*, decided at this term.(*a*) It is therefore sufficient to say that such attempted removal and dismissal present no obstacle to the relief which the relator seeks by this proceeding.

It is contended on the part of the defendants, that the acts and conduct of the relator after the passage of the act of April, 1857, evince a determination not to accept office under that act, and that such conduct and acts are equivalent to a resignation of the office; that it was not in the power of the legislature to compel him to accept an office against his will, and therefore he must be deemed as declining it.

We think a review of the position of the relator at the time of the passage of the act of 1857, and his conduct since, furnish a solution of the difficulties suggested. The act of April, 1853, created the office of policeman. To that office the relator was appointed in 1854, and which office he was entitled

(*a*) Ante, page 481.

by law to hold during good behavior, subject only to be removed in a legal manner for cause. The act of 1857, so far as it affected the relator, created no new office; it only superadded new duties to the office he then held, and declared he should continue in office and discharge those new duties. If he refused to obey the new authorities who were placed in control of the department, such refusal would subject him to trial and removal from office. We do not see how in any just sense the increasing the duties of an officer, in office, can be said to create a new office, and if he shall neglect to discharge any of these superadded duties, it can be justly said he declines to accept the new office. We do not see any new office created to accept or decline. But it is apparent from the special verdict that the relator never contemplated a declinature of the office of a policeman. He had accepted the office and was engaged in the discharge of its duties, at the time of the passage of the act of 1857. Instead of declining to execute these duties, the special verdict finds that he continued to discharge them, and received pay therefor up to July, 1857, at which time he tendered a discharge of the same duties to the defendants and has ever since been ready to do duty under their direction. These acts certainly do not, in our judgment, bear the construction claimed by the defendants, that the relator evinced a purpnse to relinquish the office of a policeman. On the contrary, we infer from them, a settled determination on his part to retain the office, but to look for orders only to the source from which he had so long received them, until it was judicially established that the defendants were the legal controlling authority of the force.

If the relator refused to obey the orders of the defendants, for that offense they had and have the power to inflict ample and speedy punishment. It is to prefer charges according to their rules, and legally remove him from the department. But we think the commission of an offense, while acting as a policeman, which would constitute a good cause of removal,

cannot be said to amount to a refusal to act in the office, or evince a settled purpose to decline it absolutely.

We think the acts of the defendants themselves, show that they did not regard the relator as having refused to continue in the office of a policeman. If he was not a policeman, why proceed to prefer charges, go through the form of a trial and give judgment of removal and dismissal? We think they properly treated the relator as a policeman in June, 1857, and if the proceedings for his removal and dismissal had been in conformity to law, so that they acquired jurisdiction over him, such proceedings would have terminated his connection with the department.

It was further contended that if the relator was a policeman and became a member of the metropolitan police, as we have held he did, yet that he could withdraw or resign. It certainly is true that this could be done, but it must be a withdrawal from, or resignation of, the office of policeman. A mere withdrawal or refusal to act under the authority of the defendants while continuing to discharge the duties of the office, cannot, we think, be said to be a withdrawal from the office, but amounts only to a disobedience of orders. It is quite true that the relator could at any time resign the office, and such resignation might be by words as well as acts. It must however be a resignation of the office; a neglect or refusal to discharge a portion of the duties of office, cannot, we think, be regarded as a resignation of the office itself.

To illustrate this point with the case put on the argument. The act of 1853 made it the duty of the mayor, recorder and city judge to act as a board of police commissioners. The recorder of the city acted as a police commissioner under this act till about December 1, 1856, when he declined, for reasons, no doubt, quite satisfactory to himself, to discharge any further duties as police commissioner. He continued to discharge the duties of recorder till the expiration of his term of office, Dec. 31, 1857. We think it would be equally as plausible to argue that he resigned the office of recorder because he de-

clined to discharge these duties, as it is to maintain that the relator resigned his office as policeman because he did not recognize the defendants as the head of the police force. Again: the act of 1857 constitutes the mayor of New York one of the board of police organized by that act. It became the duty of the mayor of New York, on the passage of that act, to discharge these duties and act as a member of the board of police.

It is well known that the mayor of this city did not assume the duties thus imposed on him until a period later than that at which the relator tendered his service to the defendants. Would it not be most unsound to say that the mayor by such refusal and neglect resigned or withdrew from the office of mayor? We think so, and can see no difference in the case suggested and the one under consideration. But suppose these acts are to be regarded as a resignation by the relator of his office of policeman, have the defendants accepted the same, or done any act precluding the relator from withdrawing such preferred resignation? We think not. We regard their proceedings in June, for the removal and dismissal of the relator, as a recognition of his status as a policeman, and the adoption of the resolution of October 9th as a full recognition of all the policemen, including the relator, who had not been legally removed, as members of the metropolitan force.

We understood it to be conceded on the argument that a person resigning an office, when such resignation is manifested by an unequivocal act, might retract or withdraw it, before the same was accepted, or any act done to fill the place made vacant by such resignation. The case of *The Mayor of Ripon*, (*Siderfin's Rep.* 14,) is an authority for this position.

In the present case the defendants never took any proceedings importing that they regarded the relator as having resigned his office, nor proceeded to fill the vacancy, but on the contrary, as we have seen, treated and recognized him as in office. Since the 3d of July the relator has done no act

evincing a disposition to resign, but on the contrary a determination to retain the office and discharge its duties.

We are all of the opinion that upon the facts found by the special verdict, the relator has been a policeman since his appointment in 1854, and is entitled to do duty as such, and that judgment must be given for the people, and the writ of mandamus as prayed for issue.

SUTHERLAND, J. Considering all questions as to the legality or regularity of the relator's dismissal or removal from the police force of the city of New York, on or about the 26th day of June, 1857, by the board of police, as disposed of in his favor by our decision, at this general term, in the cases of Gambling and others; the only question in this case, which I shall examine, is whether the conduct of the relator, subsequent to the passage of the metropolitan police act, in continuing to act under and to obey orders from the old commissioners, under the act of April 13, 1853, down to July 3, 1857, when informed of the decision of the court of appeals, declaring the metropolitan police act to be constitutional, forbid him, as one of the police, suing out this mandamus; or in other words, whether his conduct and position, as a member of the old force, after the passage of the metropolitan police act, until July 3, was incompatible with his claim to be a member of the metropolitan police force, when he sued out the writ in this case.

The special verdict in this case finds that the members of the old force, including the relator, under the command of Captain Kissner, did the police duty of the fourteenth ward, up to the last of June or first of July, 1857, and *were the only police force on duty* in the fourteenth ward; that Captain Kissner was acting, down to July 3, 1857, under the orders of the commissioners appointed under the act of April 13, 1853; that on July 3, 1857, Captain Kissner stated to the men acting under him, that the metropolitan police act of April 15, 1857, had been declared constitutional by the

court of appeals, and advised them to report themselves to the metropolitan commissioners; and asked them to give up the city property, the caps and stars they had in their possession; that the relator then and there surrendered his cap and star; that the relator has done no duty as a policeman since July 3, 1857; but since then *reported himself for duty, and has held himself in readiness for duty, as a member of the metropolitan police force.* The acts and conduct of the relator, claimed by the respondents to be incompatible with the relator's claim to be a policeman when he sued out the writ in this case, are therefore to be looked for on and prior to the 3d of July, 1857.

What were these acts, and what was this conduct of the relator, as found by the special verdict? That the relator and Captain Kissner did not recognize the metropolitan board of police, and refused to act under the said board, but continued to obey all general orders that issued from the commissioners under the act of April 13, 1853; and said Kissner made his daily returns to George W. Matsell, chief of police, down to July 3, 1857. That said Kissner and the relator each deemed the act of April 15, 1857, unconstitutional, and refused to act under it, till the courts should declare it constitutional. They were of opinion that the act of April 13, 1853, continued in force; and claimed to act under it to the 3rd day of July, 1857. That the relator acted with a body of several hundred men, who belonged to the police of the city of New York, under the act of April 13, 1853, and who continued under that organization, as distinguished from the metropolitan police, organized under the act of April 15, 1857, up to the 3d of July, 1857. These are the material facts found by the special verdict, and relied upon by the respondents, as showing that the relator had publicly withdrawn from the police force established under the act of 1857, and had resigned his office before he sued out this writ, as a policeman; and as inconsistent with a right as a policeman, under the act of

1857, to sue out this writ. David Kissner was captain of the police force of the fourteenth ward of the city of New York, and the relator one of the police force of that ward, acting under him, when the metropolitan police act was passed. That act was thought to be unconstitutional, and its constitutionality was being contested in the courts. Up to July 3, 1857, when the act was decided, by the court of appeals, to be constitutional, Captain Kissner and the relator did not recognize the new metropolitan board of police, but until then, Captain Kissner continued to obey and act under the orders of the old commissioners in office under the act of 1853, when the act of 1857 was passed; and the relator continued to act under the orders of Captain Kissner; but *both actually did police duty, down to about the first of July;* and the police force of the fourteenth ward, including the relator, in office when the act of 1857 was passed, acting under Captain Kissner, *were the only police force in that ward, up to about July* 1, 1857.

The general duties of a policeman, as a conservator of the peace, as prescribed by the act of 1857, so far as they are prescribed by that act, are the same as those prescribed by the act of 1853, under which Kissner and the relator were appointed, and were acting, when the act of 1857 was passed. The police force to be appointed by the new board of police, under section 6 of the act of 1857, was, in words, to be a "police force for the whole of the metropolitan police district, and authorized to do duty in any part thereof, without regard to residence or county lines." The relator was not appointed, and he does not claim to have been appointed, at any time, by the new board of police; but he claims to have been continued in his office, and to have been a member of the police force of the metropolitan police district when he sued out the mandamus in this case, by section 32 of the act of 1857, the last clause of which is: "The police in the cities of New York and Brooklyn, officers and patrolmen, shall continue to do duty, under existing laws at the passage of this act, and ac-

cording to the regulations of the departments of New York and Brooklyn, until after the first meeting of the board of police, under this act, when the said police shall hold office, and do duty under the provisions of the act hereby enacted, *and* as members of the police force of the 'metropolitan police district' hereby constituted." Conceding that this continuation of the then existing police force in office gave the members of it the authority to do duty in *any part* of the "metropolitan district," and the powers of constables in every part of the state, given to the members of the police *to be appointed* by the new board of police, by sections 6 and 8 of the act of 1857, yet the police duty and powers, the sphere of which was so extended, *were the same police duty and powers they were then, when so continued in office, performing and exercising*, and were bound and authorized to perform and exercise in the cities of New York and Brooklyn only. The members of the old police were, by the act of 1857, continued in office, with all their official powers and duties, under previous laws, with the additional right given to them, and the additional duty imposed upon them, by the act of 1857, of exercising and performing those powers and duties in any part of the metropolitan police district, when detailed or ordered so to do, by the new board of police. The members of the old force were not to take any new oath of office, or to do any other act or thing, to make them members of the police force of the "metropolitan police district." By the clause of section 32, above quoted, they "*shall continue to do duty*," under laws existing at the passage of the act, etc. until after the first meeting of the board of police, under the act; '*when they shall hold office and do duty*,' under the provisions of the act of 1857, as members, etc. That act does not extend to them the privilege of accepting office under the act, but *continues them in office and makes them members* of the metropolitan district police force, without requiring a single act or declaration showing their assent. By section 12 they had no right to withdraw or resign without giving one

month's notice to the general superintendent. In looking at the operation of the act of 1857, as to the then existing police force, to say that that force was by the act *transferred*, is not, it appears to me, a correct expression. They were *left* in office by the act of 1857, and new commissioners and a new general superintendent put over them by the act; and they were made liable, by the new act, to be sent out on duty into any part of the four counties comprising the "metropolitan police district." The old force were put under new officers, and were to obey their orders, and, when required, to do duty in any part of the four counties—but did this make them *new officers?* It appears to me that their then office was not abolished by the act, and they transferred to a new office, but that they continued to hold the same office after the new act, and after the first meeting of the new board of police, as before, with their official functions and duties somewhat extended.

The special verdict finds that the members of the old force, including the relator, under Captain Kissner, did the whole police duty of the 14th ward up to about the 1st of July, 1857. It does not appear, and there is no complaint that the duty, so far as the public peace and interest were concerned, was not as well performed in that ward after as before the metropolitan police act. There is nothing from which it can be inferred that the relator did not peform the same duty after, as before, that act, or that he would have performed, or would have been required to perform, any different duty, had he and Captain Kissner believed that act to be constitutional, and had recognized the authority of the new board of police. It does not appear that the relator was ever detailed or ordered by the new board of police, or their general superintendent, to do duty out of the 14th ward. It is not pretended that the relator, or any of the old police of the 14th ward, refused to obey any order of the new authorities, other than to report themselves for duty at 88 White street, or that any other specific order was issued to them by such n w authorities. The fact found by the special verdict,

that *the relator and Captain Kissner refused to act under the metropolitan board of police*, must be taken to be an inference or conclusion from the facts, that they deemed the act of April 15, 1857, unconstitutional, and did not recognize the metropolitan board of police, but continued to obey all general orders that issued from the old commissioners under the act of 1853.

It is not questioned that the relator, on due notice and upon written charges, and according to the rules and regulations of the new board and the act, might have been removed from his office, in which he was continued by the act of 1857, by the new board of police, for not reporting himself for duty to them, or for disobedience of any other supervisory order or regulation the board were authorized to make. But the question is, whether the relator's continued recognition of the old commissioners, and of their authority after the act of 1857, while continuing to do the same police duties, of his office, before and after the act of 1857, forbids his legal recognition as a member of the police force of the "metropolitan police district" at any time; or if, by the clause of section 32, above given, he is to be recognized as a member on the passage of the act, whether his subsequent recognition of the authority and orders of the old commissioners, while continuing to exercise and perform all the functions and duties of his office as policeman, changed or affected his office or position, so that it can be said that his office and position became incompatible with his continued recognition as a member of the police force of the "metropolitan police district," and that he *thus* ceased to be a member without resigning or being removed. The whole argument of the counsel for the respondents on this point appears to have originated and proceeded on the idea that the old existing police force, by the operation of the act of 1857, became different officers, and held different offices from what they were and had before; and that the relator's office of policeman depended upon which of the authorities he recognized—the old or the new. I think the relator was the

same officer, and had the same office, after the act of 1857, as before, and whether he recognized the old or the new commissioners. He was continued in office by the act without his consent, and could have been removed under the act, for cause. But *until removed*, no idea or belief of his of the unconstitutionality of the metropolitan police act, or recognition of the old commissioners rather than the new, could change or affect his own office. Notwithstanding his acts and conduct set forth by the special verdict in this case, he continued to be a policeman of the 14th ward, and a member of the police force of the "metropolitan police district" within the meaning of the act of 1857. And it seems that the respondents thought so too, for their attempted removal of him from that force on the 26th of June, 1857, necessarily implied that he was then a member of that force. It appears to have been the main purpose of the metropolitan police act, to put over the whole body of the old police force then existing, new officers; whether for the better government of the city, or for the political welfare of the members of that force, is immaterial. It might be conceded that policemen *appointed by the new board for the new metropolitan police district*, upon their number being fixed by the supervisors, would be new officers, and their offices new offices, but I do not see that such concession would affect the view I have taken of the main question in this case.

Judgment for the relator, and directing a mandamus to issue, as prayed for.

[New York General Term, February 1, 1858. *Davies, Clerke* and *Sutherland*, Justices.]

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THE PEOPLE OF THE STATE OF NEW YORK and CHARLES DEVLIN *vs.* DANIEL D. CONOVER.

All the provisions of the act to amend the charter of the city of New York, passed April 14, 1857, (except those made specifically applicable to the succeeding common council,) were in force on the 1st of May, 1857, and applicable to all city officers then in office. And ample provision being made by that act for the appointment of heads of departments, by the mayor and board of aldermen, the act of February 3, 1849, "to provide for filling vacancies in office," which authorizes the governor to fill vacancies in office *where no provision is made by law for filling the same*, is inapplicable to the case of a vacancy occurring in the office of one of the heads of departments, since the amended charter took effect.

Accordingly, where a vacancy occurred in the office of street commissioner, by the death of the incumbent, on the 9th of June, 1857; *Held* that the mayor and board of aldermen had full power and authority to fill the said vacancy; and they having exercised that authority, by the appointment of D., as street commissioner, it was *further held* that the latter was legally appointed, and was entitled to hold the said office, as against C., who had been appointed to fill the vacancy, by the governor.

Under the act of February 3, 1849, the governor is authorized to appoint only when a vacancy happens in an office which can be filled at an annual election.

APPEAL from a judgment entered at a special term, on demurrer to the complaint. The complaint, which was filed by the attorney general, in behalf of the people and of Charles Devlin, alleged, *First.* That prior to and on the 12th day of June, 1857, in the municipal corporation entitled "The Mayor, Aldermen and Commonalty of the City of New York," there was, and still is, an executive department created and existing under the laws of said state of New York, denominated the street department, the chief officer of which department was, and is called in law, the street commissioner, which office of street commissioner then was, and ever since hath been, and still is, a public office in said city. *Second.* That in November, 1855, one Joseph S. Taylor was duly elected to the said office of street commissioner of the city of New York, for the term of three years from the first Monday of January, 1856, and entered upon the duties of said office on the said first Monday of January, 1856, and continued to fill the said office, and discharged the duties thereof until the 9th day of

June, 1857, when he died, whereby the said office of street commissioner became, and thence, until and at the time of the appointment hereinafter referred to, was vacant. *Third.* That after the death of the said Taylor, and on the 16th day of June, in the year 1857, the said Charles Devlin was appointed to said office of street commissioner by the mayor of said city, with the advice and consent of the board of aldermen, and that after such appointment, and on the same 16th day of June, 1857, he, the said Charles Devlin, in due form of law, and according to the ordinances of the corporation of said city in that behalf made and provided, gave sufficient security for the performance of his duties as such street commissioner, in the form and amount for that purpose prescribed by the said ordinances, and took and subscribed, before the mayor of said city, and filed his oath of office in due form. And the said Charles Devlin accepted such appointment and in all respects qualified himself to assume such office and perform the duties thereof. *Fourth.* That on the 12th day of June, 1857, the defendant, Daniel D. Conover, was appointed by the governor of the state of New York, to fill the aforesaid vacancy, created by the death of the said Joseph S. Taylor. That a commission, under the great seal of the state, for his appointment to fill such vacancy, was thereupon issued and delivered to him. That being so appointed he accepted the said office and complied with the requirements of the law and the ordinances of the said city in respect to his oath of office and official bond in such manner that if his appointment were valid and operative he became entitled to execute the said office of street commissioner; but the plaintiffs alleged that the governor had no power, warrant or right, to make such appointment, but that the said Conover, claiming under the same at the said city and county of New York, on the 16th day of June, 1857, without any other or any legal warrant, right, or grant, whatever, intruded into and usurped the said office of street commissioner, and then and from thenceforth, hitherto hath unlawfully held and exercised the said office of street commissioner in the city of New

York, and still doth, under said pretended appointment, so unlawfully usurp, hold and exercise the said office, and all the power and authority thereof, in contempt of the people of the state of New York, contrary to the constitution and laws of said state, to the prejudice of the said people, and to the exclusion of the said Charles Devlin from the said office, and in violation of the rights of said Devlin, under his aforesaid appointment. Wherefore the plaintiffs prayed that the said Daniel D. Conover might answer and show by what warrant he claimed to hold the office of street commissioner; and the plaintiffs demanded judgment against Conover, that he was not entitled to said office, and that he be ousted from such office, and its franchises and privileges, and that the said Charles Devlin be adjudged entitled to the said office and its franchises and privileges, and that the said defendant pay the costs of this action; and for other or further relief.

To this complaint the defendant demurred, on these grounds: *First.* That the complaint did not state facts sufficient to constitute a cause of action against the defendant. *Second.* That it did not show any right or title in the said Devlin to the said office of street commissioner of the city of New York.

After argument of counsel, the court, at special term, ordered and adjudged that the defendant have judgment against the plaintiffs, on the demurrer, with costs. The plaintiffs appealed from the judgment.

J. T. Brady and *Charles O'Conor*, for the plaintiffs.

D. D. Field and *W. C. Noyes*, for the defendant.

DAVIES, J. Two questions are presented for consideration, in this case: one, whether the defendant is entitled to the office of street commissioner of the city of New York; the other, whether the relator is entitled to the same office. Both claim to have been legally and duly appointed; and this suit has been instituted to determine which is entitled to the office.

The defendant claims it by virtue of an appointment made by the governor of the state, on the 12th day of June, 1857; and the relator claims it by virtue of an appointment made by the mayor and board of aldermen, of this city, on the 16th of the same month.

It will best tend to a proper examination of the case, to consider, in the first place, the title of the defendant to this office. But before this is done, it may be necessary briefly to refer to the history of the office itself.

This office is one long known in the history of the city government, and was created, and the duties defined, by the by-laws and ordinances of the city. The tenure of the office, mode of appointment, which was by the common council until the incumbent was first elected, in the fall of 1849, and the duties of the office, were all prescribed by ordinance. He was a city officer, created by ordinance, which might be repealed at any time, and holding his office at the pleasure of the common council. His duties were local, and his compensation paid out of the city treasury. No mention is made of the office in any of the city charters prior to that of 1849. By the charter of 1830, the common council was directed to organize and appoint distinct departments to transact the executive business of the corporation. (*See Charter of* 1830, *sec.* 21; *Dav. Laws, p.* 202.) This duty was neglected by the common council till 1839, when among other departments organized was that of the street commissioner. The ordinance of May 9, 1839, organized the department, defined its duties, prescribed the officers therefor, and placed at its head the street commissioner. The amended charter of 1849 continued this department, and the street commissioner as its head, but with greatly enlarged powers and duties. (*See Charter of* 1849, *sec.* 12; *Dav. Laws, p.* 206.) Section 19 of this charter authorized the common council to pass ordinances regulating the duties of these departments; and the duties of this department were defined by

title 4 of the ordinances organizing the municipal departments, passed May 30, 1849, and all former ordinances repealed.

Frequent reference is made, in the laws of the state, to this officer, as thus established by the ordinances of the city. See chapter 2, Laws of 1830, where the street commissioner, or his assistant or deputy, was authorized to conduct sales of lands for taxes and assessments. From that time, numerous references are made to the same officer. (*See Laws of* 1839, *ch.* 209; 1840, *ch.* 326; 1841, *ch.* 170, 171, 230; 1843, *ch.* 235.) By the amended charter of 1849, the street commissioner was thereafter to be elected by the people, and hold his office for the term of three years. It is thus seen that prior to the passage of the amended charter of 1849, on the 2d of April in that year, the street commissioner was a city officer, created by ordinance of the common council, appointed by that body, and holding his office at their pleasure, and subject to removal and appointment at any time.

At the charter election held in the city in November, 1855, Joseph S. Taylor was elected to the office of street commissioner, for the term of three years from the first Monday of January following. He died on the 9th day of June, 1857; and the defendant was appointed by the governor of this state, to that office, on the 12th day of that month. The authority for this appointment is claimed to be found in the 1st section of the act to provide for filling vacancies in office, passed Feb. 3, 1849. (*Laws of* 1849, *chap* 28.) This section declares, "that whenever vacancies shall exist, or shall occur, in any of the offices of this state, *where no provision is now made by law for filling the same*, the governor shall appoint some suitable person, who may be eligible to the office so vacant, or to become vacant, to execute the duties thereof until the commencement of the political year next succeeding the first annual election after the happening of the vacancy at which such officer could be by law elected." At the same session, and on the 2d of April following, the legislature passed the act to amend the charter of the city of New York. (*Laws*

of 1849, *chap.* 187.) By this charter, as we have seen, the street department was created, and the street commissioner made the head thereof. He was to be elected at the then next charter election, and to hold his office for the term of three years. By the 20th section of this charter it was provided that in case of any vacancy in any of the heads of departments, by removal from office or otherwise, the mayor, by and with the advice and consent of the board of aldermen, should appoint a person to fill the same, until the vacancy should be filled by the electors, at the next succeeding charter election.

Recurring now to the act of Feb. 3, for filling vacancies, we see that it is expressly limited to such vacancies as shall exist or occur, where no provision is made by law for filling the same. When, therefore, any such provision is made, the power thus conferred on the governor is clearly inapplicable. This law could, therefore, have no application to the office of street commissioner, at the time of its passage; for, full provision was then made for his appointment by the common council, at any time it might suit the wisdom of that body to exercise the power of appointment, either by creating a vacancy by removal, or filling one which might happen from any cause. This law was not intended, clearly, at the time of its passage, to have any reference to this office.

Another reason why in my opinion it was inapplicable to this office is, that the true and obvious construction of the law is to provide for filling vacancies in elective offices, when the appointing power cannot be convened until the next succeeding election. It therefore in terms declares that the person appointed shall execute the duties of the office until the commencement of the political year next succeeding the annual election, after the happening of the vacancy, at which such officer could be by law elected. This language leaves no doubt on my mind that the governor was only authorized to appoint when a vacancy happens in an office which could be filled at an annual election. If it could be construed as applicable to non-elective offices, it is at once perceived that there

is no limitation upon the term of the appointee. Another and controlling reason, to my mind, why it is only applied to elective offices is, that ample provision was already made for keeping full all offices in the state, which were held by appointment. In such cases the appointing power can always be promptly invoked, and any vacancy be speedily filled. While in the case of elective offices, the appointing power, so to speak, is convoked or can act only annually, at the election, and therefore the imperative necessity for placing in some hand ever ready to act, (and none more appropriate than the state executive,) the power to fill the vacancy, until the commencement of the political year next after it happens, and after the election at which it could be supplied. Our state elections occur in November, and the will of the people is not officially ascertained and announced until in December following. It seems to me that this was the obvious meaning of the framers of this law. The evil to be guarded against was, that no office should remain vacant for any considerable period of time, and this was effectually obviated by the provisions of this act. We cannot doubt that these were the motives and considerations which induced its passage. When the amended charter of 1849 was passed for this city, making certain officers in the city elective, it was seen that to prevent the same evil, a similar provision must be made as to them. Hence the like authority, given as we have seen to the mayor and board of aldermen to fill any vacancy in the elective offices of the city, until the same could be supplied at a charter election. This was entirely unnecessary if the previous act of Feb. 3, 1849, was applicable to city officers. If this provision of the charter had been in force, at the happening of the vacancy caused by the death of Mr. Taylor, it is manifest the law of Feb. 3, 1849, would have had no application to it, as provision was fully made by law for filling it, that is by the mayor and board of aldermen. But the charter of 1849 was repealed by the act to amend the charter, passed April 14, 1857, which went into effect on the first of May, 1857. But by the last

mentioned charter the street commissioner ceased to be an elective officer, and therefore no person could be elected to succeed the appointee of the governor, and there would consequently be no termination of his office. It therefore follows, I think, that this office is one not contemplated by the law of Feb. 3, 1849, and not within its meaning and spirit; and if there was any provision for filling this vacancy, by law, at the time it happened, this office is excluded from the operation of this act by express words and its clear import. The defendant has not, therefore, any valid or legal title to the office of street commissioner.

The next inquiry is, has the relator any title to the office? This depends upon two considerations: first, whether the provision made in the charter for appointing this officer was in force at the time (April 14, 1857) the vacancy occurred in this office; and secondly, whether such provision is applicable to this vacancy so as to authorize an appointment. *Bouvier*, (2 *Law Dic.* 619,) describes a vacancy to be a place which is empty. The term, he says, is principally applied to cases where an office is not filled. The appointing power, wherever it may lie, is called into operation as soon as an office is not filled, whether such vacancy is occasioned by death, resignation or efflux of term, or any other cause. As soon as the office is not filled, the appointing power can act. In elective offices, we have seen that an appointing power is only invoked temporarily, until the real appointing power—the electors—can meet and act by election. Now the 19th section of the charter of 1857, after alluding to these city officers, heads of departments, who are to continue elective, declares that "the other heads of departments, (including that of street commissioner,) shall be appointed by the mayor, with the advice and consent of the board of aldermen." If, therefore, this provision of the charter was in force when this appointment was to be made, ample provision was made by law for filling the office; and the contingency contemplated by the act of Feb. 3, 1849, for invoking the aid of the state executive, did not

arise. It is clear, specific and direct, that this officer shall be appointed by the mayor and board of aldermen. There is no time specified when they shall appoint, but the fair and natural inference is, that the appointment is to be made whenever the necessity exists for the exercise of that power. But it was earnestly contended on the part of the defendant, that these provisions of the charter of 1857, though declared by the legislature to take effect on the first of May, 1857, did not in fact take effect in reference to, or confer any duties upon, the mayor and board of aldermen then in office, but that the same were only applicable to such officers to be elected at the next charter election, and who were to take office on the first Monday of January following. The position assumed is that all these provisions refer to the future officers to be elected, and not to those in office at the time the charter took effect. If we yield to this argument the result is, that from the first of May last until the first of January, 1858, we in truth had no city government, and the acts of those in office during that time were without warrant of law; for the charter of April, 1857, repealed the charters of 1830, 1849, 1851 and 1853. They ceased to have any existence on the first of May, 1857, and can it be supposed that the legislature intended to abolish the wholesome restraints contained in them upon the common council and city officers then in office? If this argument be sound, the mayor and recorder were made again members of the common council, the aldermen judges of the sessions and of the oyer and terminer. The board of councilmen were blotted out of existence, without calling into place for this period any other body. The veto power of the mayor was withdrawn, and in truth the whole affairs of the city government would have been thrown into inextricable confusion, opening wide the floodgates of litigation, and imposing fresh and enormous burthens on our already overtaxed citizens. We cannot yield our assent to these views, and as the case was put before us as mainly turning upon this point, we deem it proper to give it a careful examination.

We think such an intent on the part of the legislature, invoking such calamitous results, before we can assent to it should have been clearly and explicitly declared. If such is the law it would be our duty unhesitatingly to yield obedience to it, and in good faith aid in its execution. But we infer that the legislature have in truth declared the contrary. In section 51 it is provided that all officers elected under former laws shall continue in office until those elected under that act shall take office, and no longer.

What is meant by continuing in office? Manifestly, unless otherwise expressed, with the powers and duties then possessed by those officers, who are thus continued, and then conferred, except so far as the same was modified or altered by the charter of 1857. The repeal of the previous charter left them without functions or duties to discharge, unless this view be sound. Denio, justice, in *The People* v. *Draper*, (15 *New York Rep.* 540,) says "public officers without the ability to perform public functions would be an absurdity."

We think, therefore, it clearly follows from the necessity of the case, the very words of the charter of 1857, and the known and obvious intent of the legislature, that all its provisions except those made specially applicable to the succeeding common council, were in force on the first of May, 1857, and applicable to all city officers then in office. That their duties were to be discharged in accordance with the provisions of this new charter, and it was their duty in good faith to execute it and perform those duties. This position being established, as we think it clearly is, the case is free from all difficulty.

Full power was given to the mayor and board of aldermen to appoint this officer, at any time when that power of appointment could be legally exercised, and we think it could be thus exercised whenever the office was empty, or not filled. This was the case on the 9th of June, when Mr. Taylor died; and provision being thus made by law for filling the office, the authority conferred on the governor by the act of Feb. 3, 1849,

was inapplicable, and excluded by the express words of that act. It follows that the relator was legally appointed to the office of street commissioner on the 16th of June, 1857, by the mayor and board of aldermen, and is entitled to the office.

Judgment of ouster against the defendant must be given, and judgment for the plaintiffs, and declaring that the relator Devlin is entitled to the office of street commissioner.

SUTHERLAND, J. Prior to and on the 12th day of June, 1857, there was, and still is, an executive department of the municipal corporation known as "the mayor, aldermen and commonalty of the city of New York," called the "street department;" the chief officer of which department was and is called the "street commissioner," his office being a local, city, public office. In November, 1855, Joseph S. Taylor was elected to the said office of street commissioner, for the term of three years from the first Monday of January, 1856; and entered upon the duties of the office, and discharged its duties until the 9th day of June, 1857, when he died. By his death the office of street commissioner became vacant. After the death of Taylor, and on the 16th day of June, 1857, the plaintiff, Charles Devlin, was appointed to the said office of street commissioner by Fernando Wood, then mayor of said city, with the advice and consent of the board of aldermen of said city; and after such appointment, and on the same day he was so appointed, in due form of law, and according to the ordinances of the corporation of said city in that behalf made and provided, he gave security for the performance of his duties as such street commissioner, and took and subscribed before the mayor of said city, and filed, the official oath required by law. On the 12th day of June, 1857, the defendant, Daniel D. Conover, was appointed by the governor of the state of New York, to fill the vacancy created by the death of Taylor; a commission under the great seal of the state to fill such vacancy being issued, and delivered to him; and Conover accepting the office, and complying with

the requirements of the law, and the ordinances of said city, in respect to his oath of office and official bond, in such a manner that if his appointment by the governor was legal and valid, he was and is thereby entitled to exercise the functions of the office. Since the 16th day of June, 1857, Conover, without any other right or title than that conferred on him by his appointment by the governor, and subsequent qualification according to the forms of law, has held and exercised the said office, and all the powers and authority thereof. The question is, which had the right of appointment on the death of Taylor—the mayor, with the advice and consent of the board of aldermen, or the governor?

The question is raised by the demurrer of the defendant to the complaint of the people of the state and Devlin, in an action of the nature of a *quo warranto*, setting forth Devlin's right and title to the office, by the appointment of the mayor, &c., as above stated; Conover's appointment by the governor, &c.; and charging Conover with unlawfully usurping, holding and exercising the office. The demurrer alleges, first, that the complaint does not state facts sufficient to constitute a cause of action against the defendant. Second, that it does not show any right or title in Devlin, to the office of street commissioner. The question comes here by the plaintiff's appeal from the judgment rendered at special term, on such demurrer, on the 25th day of January, 1858.

The plaintiffs insist that the mayor, with the advice and consent of the board of aldermen, had the right to appoint Mr. Devlin, by section 19 of the act to amend the charter of the city of New York, passed April 14, 1857; which section provides that the mayor, comptroller, and counsel to the corporation shall each be elected by the electors of said city, and that the other heads of departments shall be appointed by the mayor, with the advice and consent of the board of aldermen. The defendant insists that, although by section 55 of the act, it was to take effect on the first day of May, 1857; and although by section 51 of the act, Fernando Wood,

mayor of the city when the act was passed, elected under a previous law, to that office, in November, 1856, for the term of three years, was continued in office until a mayor should be elected at the first election of charter officers after the passage of the act; which election, by the same section 51, was to take place on the first Tuesday of December, 1857; yet that it is apparent, from other provisions of the act, and from its general tenor, purpose and object, that the legislature did not intend, by said section 19, to give, and that section did not give, the right and power of appointment thereby conferred in general terms upon the mayor, &c. to the said then mayor. And the defendant therefore further insists, that as the act of April 2d, 1849; the act of July 11, 1851; the act of April 12, 1853; the act of June 14, 1853, and all laws which, if unrepealed, might have authorized the appointment of Devlin by the mayor, &c., on the 16th day of June, 1857, to fill the vacancy occasioned by the death of Taylor, had been repealed by section 54 of the said act of April 14, 1857, there was, on the 12th day of June, 1857, when he (the defendant) was so appointed by the governor to fill that vacancy, no other provisions made by law for filling it, than the provision made by the act of February 3, 1849; which act declares that, "whenever vacancies shall occur in any of the offices of this state, where no provision is now made by law for filling the same, the governor shall appoint some suitable person who may be eligible to the office so vacant, or to become vacant, to execute the duties thereof until the commencement of the political year next succeeding the first annual election after the happening of the vacancy at which such officer should be elected by law."

To Conover's title to the office by appointment by the governor thus set up, and justified under the act of February 3, 1849, the plaintiffs present and insist upon these objections. *First.* If the legislature thereby intended to give the governor the power to fill a vacancy occurring in a mere local, city office, like that of street commissioner, that it is so far unconstitu-

tional and void. *Second.* That the act was not intended to give, and did not give, the governor the power to appoint Conover. 1st. Because the office of street commissioner was not, and is not, a *state office*, or an *office of the state*, within the meaning of the act. 2d. Because, by its very terms, it only applies to vacancies in elective offices; and that it is not reasonable, or in accordance with previous legislation, to suppose that it was intended to apply to any other; and by the act of April 14th, 1857, (the amended charter,) the street commissioner ceased to be an elective, and became an appointable officer. 3d. That as by section 20 of the act of April 2, 1849, to amend the charter of the city of New York, passed at the same session as the act of February 3d, 1849, the street commissioner was to be elected every three years; and in case of a vacancy in the office, the mayor, by and with the advice and consent of the board of aldermen, was to fill the vacancy by appointment; such act of April 2d, 1849, is to be deemed a legislative construction of the act of Feb. 3d, and conclusive evidence that the act of Feb. 3d was not intended to apply to a vacancy in the said office of street commissioner. *Third.* The plaintiffs present Devlin's affirmative title under the amended charter of April 14th, 1857, as a complete answer to Conover's claim under act of February 3d, 1849, and say that "there is nothing in any rule of construction, or in the reason of the thing, to limit the power of appointment given by section 19 of the act of April 14th, 1857, to the mayor, &c. to the single case of a vacancy created by the efflux of time;" that the whole power of appointment being, by that section, vested in the city authorities, in general terms, they had the right, on the death of Taylor, to appoint Devlin for the full term of the office, as fixed by section 21 of the act.

The objections thus taken to Conover's title, as I have stated them, involve, I believe, all the material questions that have been raised in this case; and I now proceed to examine them very briefly, though not perhaps *seriatim*, in the order in which they have been stated. If the governor had no

right to appoint Conover under the act of February 3d, 1849, it does not follow that the mayor had the right to appoint Devlin under the act of April 14th, 1857. I have, therefore, stated the plaintiffs' objections to the defendant's title, in such a manner as to call for the consideration of the right and title of both. And first as to the constitutional question:

In England the governmental divisions of territory into counties, shires, towns, villages and cities, for the greater convenience of government, is as old as the common law. A similar division into counties, towns, cities and villages, has existed in this country, and has been recognized by our constitution and laws, from the first. Necessarily, there have always been certain county, town, village and city public officers, because there have always been certain local public charges and duties to be performed, by some one, corresponding with these territorial governmental divisions. By section 2 of article 10 of the constitution of 1846, "All county officers whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties, or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct. All city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed as the legislature may direct." By section 5 of the same article, "The legislature shall provide for filling vacancies in office; and in case of elective officers, no person appointed to fill a vacancy, shall hold his office by virtue of such appointment longer than the commencement of the political year, next succeeding the first annual election after the happening of the vacancy." The functions and duties of an office constitute the office; and the local charac-

ter of these duties, and the local interests which the inhabitants of counties, towns and cities, as such, have in the performance of those duties, make the office a county, town, or city office. The office of street commissioner of the city of New York, from the local nature of its duties, is necessarily a city office. It is not a new office. Its duties must have been performed, by some one, long prior to 1830, and as early as 1830 it was recognized by the ordinances of the common council of the city by the title of street commissioner. By section 21, of the act of April 7th, 1830, it was made the duty of the common council of the city to organize distinct departments, for the performance of the executive business of the corporation. Accordingly a department, known as the street commissioner's department, was organized, with its chief officer known as the street commissioner. His office, known and recognized as the street commissioner's office or department, was continued, and was existing when the constitution of 1846 took effect. Conceding, therefore, since the decision of the court of appeals, in the case of *The People* v. *Draper*, (15 *N. Y. Rep.* 532,) that the reservation to the electors or local authorities of the right to elect or appoint county, city, town and village officers, contained in sec. 2 of art. 10 of the constitution, relates only to such officers as existed when the constitution took effect, the city of New York has the full strength of the constitutional reservation or guarantee of that section, that the street commissioner shall be elected by the electors thereof, "or appointed by such authorities thereof, as the legislature should designate for that purpose." There is nothing in this section of article 10 limiting this general right of election, or of appointment, to fill a vacancy which has occurred or is anticipated from efflux of time, or from the expiration, or anticipated expiration, of the full official term of the incumbent. The whole right of election, or of appointment, is vested in the electors or city authorities. The legislature can as well designate the city authorities which shall appoint to a vacancy occasioned by

death, as to one occasioned by efflux of time; and the legislature can as well designate the city authorities which shall appoint to fill a vacancy in an *elective* office occasioned by death, as a vacancy ocasioned by the death of an *appointable* officer; and thus the legislature can, in *all cases* of a vacancy, secure to the city an appointment by its own authorities. General power to appoint, without words of limitation or exception, would carry with it the power to appoint in all cases where the office is not filled. By section 5 of the same article of the constitution, "the legislature shall provide for filling vacancies in office," &c. If this section applies to vacancies in the city, town, and village offices mentioned in section 2, as not provided for in section 2; then, it appears to me, that taking the two sections together, their fair and reasonable construction is, to limit the power of the legislature as to such vacancies, to the power of designating and providing whether they shall be filled by the electors of the city, &c. by election, or by the authorities of the city, &c. by appointment; and if by appointment, the authorities thereof that shall make the appointment. Section 2 of article 10 is to be looked upon as reserving or guarantying to cities, towns, &c. certain rights of local territorial self-government, *as against the legislature.* In looking for the extent of this reservation—the fair meaning and intent of this section—it will not do to start with the theory of the omnipotence of the legislature, and then reason back for the rights of the cities, towns, &c. The omnipotence of governments—whether founded on the great political as well as legal principle of the feudal law, *that territory confers jurisdiction;* or on divine authority; or on military power—has no place in our institutions of government. The problem in constructing our written constitutions was, to form an *efficient* government, working by majorities, and at the same time protect the rights of minorities. This protection is given in the constitution, not only by the express limitations of the powers of legislation thereby granted, but also, as well expressed by

Judge Denio in the case of *The People* v. *Draper*, by limitations implied from the frame of the government, the grant of legislative power itself, and other express grants in the constitution. It is a most extraordinary doctrine to say, that these limitations of the power of the legislature are to be looked upon with suspicion, as repudiating the power of the people. The legislature does not represent the people, but only a majority of the people. Courts, by giving full force and effect to a constitutional limitation according to its real purpose and intent, having reference to the constitution itself as the construction of a limited government only, do give full force and effect to the sovereign power of the people; while at the same time by so doing, they protect the rights of the minority; or of the city, town, &c. in whose favor a right may have been reserved. It is the duty of the court to construe these limitations unembarrassed by European analogies. And in the case of a plain legislative evasion of the constitution, it is the duty of the court to charge upon the legislature any motive the evasion would plainly imply. The restrictions in the constitution imply that the legislature might not always have public motives for their acts.

With these views of the constitution and of its limitations, which are certainly not out of place in considering the questions in this case, and which are given with reference to somewhat different views advanced by counsel on the argument; and looking upon the 2d section of article 10 of the constitution as intended to secure to cities, towns, &c. the right of electing or appointing the officers of their then local existing offices, in all cases; I think the governor had no constitutional right, under the act of February 3, 1849, or otherwise, to appoint the defendant to the office of street commissioner of the city of New York on the death of Taylor.

But was the act of February 3, 1849, intended to give the governor any such power? This brings me to the consideration of other objections taken by the plaintiff to the defend-

ant's title under that act. It would certainly seem not very probable that the legislature, in passing the act of February 3, 1849, had in view any such office as street commissioner of the city of New York. Without reference to any constitutional objection, it would seem that the convenience of government would not have permitted them intentionally to impose on the governor, the filling of vacancies to occur from time to time in all the petty city, town and village offices in the state. It is therefore doubtful, although all public offices, including the most petty village office, are, in one sense, offices of the state, whether the legislature, in using those words in the act of February 3, 1849, did not use them with reference to the classification of state officers in the revised statutes, and to the recognition in the constitution, of city, town and village offices, as distinguished from state offices. However this may be, the amended charter of the city of New York, passed April 2, 1849, at the same session as the act of February 3d, may be looked upon as a legislative construction by the same legislature that passed the act of February 3d, not only of section 2 of article 10 of the constitution, but of the act of February 3d. By section 20 of the amended charter of 1849, the heads of the departments, except the Croton aqueduct board, were to be elected every three years by the people; and in case of a vacancy in any of said heads of departments, by removal from office or otherwise, the mayor, with advice, &c. of the board of aldermen, had power to fill the same, until filled by the electors at the next charter election. The office of street commissioner ceased to be elective by the amended charter of 1857, and there is certainly much force in the plaintiffs' objection to Conover's title, that the act of February 3d, 1849, only applies to elective offices. By the act, the appointee of the governor to fill the vacancy must be "*eligible to the office, &c.*" and he is "to execute the duties thereof until the commencement of the political year next succeeding the first annual election after the happening of the vacancy," &c. It is *said* that Conover's term, if his appointment is

valid, must be without limitation, as there is never to be any election to fill the office.

I come now to the consideration of the right of the mayor to appoint Devlin under the act of 1857; and whatever may be the construction of the act of February 3, 1849, and however constitutional, if Devlin's appointment under the act of 1857 is valid, Conover's is void. The amended charter of 1857 appears to have been passed, not only for a partial reconstruction of the city government, but to legislate some of the then city officers out of office, and others in. By section 51, the offices of commissioners of repairs and supplies, and of commissioner of streets and lamps, were abolished; the comptroller, counsel to the corporation, street commissioner, city inspector, and the officers of the Croton aqueduct department then in office were continued in office until the expiration of their several terms; all other persons elected under former laws, then in office, including the mayor, aldermen, &c. were continued in office until the first election for charter officers under the act; which was to take place on the first Tuesday of December, 1857. When the act was passed and took effect, Mr. Wood was mayor, elected in November, 1856, for the term of two years; and Mr. Taylor was street commissioner, elected in November, 1855, for the term of three years from the first Monday of January, 1856. By section 54, all the old charters and acts amending the charters, since that of Dongan and Montgomerie, were repealed. By the 19th section, the mayor, comptroller and counsel to the corporation, are to be elected; the mayor for the term of two years; the counsel to the corporation for the term of three years, &c. The other heads of departments (including the street commissioner) "shall be appointed by the mayor, with the advice and consent of the board of aldermen." By section 20, the mayor, comptroller, and counsel to the corporation, may be removed by the governor, for cause; and the vacancy occasioned by the removal of the comptroller, or counsel to the corporation, shall be filled by the mayor, with the advice, &c. By section 21, the other

heads of the executive departments (including street commissioner) shall hold their office for two years, and until the appointment of their successors. By section 1, "The mayor, aldermen and commonalty of the city of New York" shall continue to be a body politic, &c., with all the grants, powers and privileges heretofore had by "the mayor, aldermen and commonalty of the city of New York." There is no section or provision prescribing or defining the general powers and duties of the mayor; nor is there any specific provision in the act, limiting the power of appointment given by section 19, to a mayor elected under the act; or the general right of appointment given by section 19, to the single case of *a vacancy created by efflux of time*, so that neither the then mayor continued in office by the act, or the present mayor elected at the first election, under the act, if so limited, would have had a right to fill the office at any time before the expiration of the term for which Mr. Taylor was elected. Nor is there any specific clause or provision declaring that the powers or duties prescribed for the other offices, whose incumbents were continued in office by the act, were not intended to be given and prescribed for the officers so continued in office. (*See* §§ 1, 6, 8, 10, 11, 16, 17, *&c.*) There is no reason, and I know of no rule of construction or precedent which would authorize us in saying, that the general power of appointment given by section 19, did not authorize the mayor so continued in office, to fill the office, on the death of Mr. Taylor, if the general power thereby given to the mayor &c., was conferred on him, as *continued in office*, by section 51. The appointing power being always at hand, ready to act, there was no need of a special provision distinguishing between the appointment, or right of appointment to fill the office, as a vacancy might occur by casualty, or by the expiration of the term, from efflux of time.

It is difficult to find a precedent of legislation providing for filling vacancies in offices filled by appointment, prior to the constitution of 1846. That constitution made many offices elective, which were not so before; and hence the act of

Feb. 3, 1849. If, therefore, this general power of appointment was intended to be given to the then mayor of the city, so continued in office, we hold that Devlin's appointment by the mayor was valid, although for the full term of the office, as fixed by the new act, and not for the unexpired term for which Taylor was elected. Now, why did not the act give that power, as well as all other general powers given to the mayor, by the title of the office, to the then mayor so continued in office? It would be absurd, as said by Judge Denio, in the *People* v. *Draper*, to continue an officer in office, without the functions of the office. It is the functions and duties of an office that make the office, and why did not the mayor so continued in office, take the power or function of appointment under section 19, as well as other powers and functions given by the act, or by the old charters, or any unrepealed provisions of former laws?

But the counsel for the defendant insists, that by continuing the then mayor in office, it was not intended that he should have any of the new powers conferred on the office of mayor, by the act, but that he might continue to exercise the *necessary duties of the office*—such duties only as were implied in the existence of the office; that it is manifest from the act that it was passed under a distrust of the then city government, and to protect the citizens against certain officials, at the head of whom was the then mayor; and that the legislature never could have meant that the then existing mayor (Wood) should have the power to appoint the agents with whom the new mayor to be elected under the act, was to carry out the work of reform. If the act was not passed from public motives, but with the particular views insisted upon by the counsel, it is perhaps a sufficient answer to his construction of the act, derived therefrom, to say, that the legislature probably did not suppose that Mr. Taylor would die so soon; and, therefore, did not think of providing in any way against the mayor, whom they so continued in office, exercising the general power of appointment on the happening of such a contingency.

The counsel further insists, that all the old charters, except

that of Dongan and Montgomerie, being repealed, such officers as were continued in office by the new act, were, after the act, *statutory officers created by the act;* that Taylor's office of street commissioner thereby became a statutory office, to expire on the 1st of January, 1859, he deriving all his powers as an officer from the act of 1857; and that it follows, that neither the then mayor so continued in office, nor the present mayor, could appoint or remove a street commissioner (or other officer continued in office by the act) till the expiration of the term for which he was elected under the old charters; and that in case of a vacancy happening in the office before the expiration of that term, the governor alone could fill it by appointment, under the act of February 3, 1849. Now, the charter, or act, under which Taylor was elected, may have been repealed by the act of 1857; yet his office was not abolished, but continued; and his election and term of office were recognized and continued by the act of 1857. Section 25, which declares that there shall be an executive department to be denominated the street department, which shall have cognizance of opening, altering, &c., streets, &c., the chief officer of which shall be called street commissioner, &c., does not create a new department, with a new chief office, and new chief officer, to commence or go into operation on the expiration of the term for which Taylor was elected; but, like sections 24, 25, continues, and perhaps partially reconstructs, an old department with its chief office and officer; and this continuance is an exception in the act itself to the operation of the general repealing section, 54. Taylor's office was not created, but continued, by the act. Taylor was continued in it until the expiration of the term for which he had been elected unless he should sooner die, resign, or be removed; when vacant by death, resignation, removal, or the expiration of the term for which he had been elected, it was no longer to be filled by the electors, but by appointment.

The same act which made Taylor a statutory officer, gives to the statutory mayor the general statutory power of appointment

and removal; and there is nothing in the act to show that this power of appointment was to be suspended to let in the power of the governor under the act of February 3, 1849, whatever may be the construction of that act, or its constitutional validity. I do not think that the legislature had any such intention.

I think the legislature, when it continued the mayor and others of the city officers in office under the new charter, meant to give them, and did give them, all the powers and functions conferred by it on their offices, except where they may have otherwise expressly provided; and there being no express provision limiting the power of appointment in section 19, or suspending its operation, I think the mayor so continued in office had the power; and that Devlin's appointment was valid, and Conover's void.

CLERKE, J. concurred.

Judgment for the plaintiffs.

[NEW YORK GENERAL TERM, February 1, 1858. *Davies*, *Clerke* and *Sutherland*, Justices.]

E. & J. F. BRODERICK *vs.* SMITH.

A court of equity will refuse its aid where plaintiffs seek its interposition to enforce a remedy, under circumstances which it considers unconscionable.

It will afford protection to a mortgagor, against oppressive and unreasonable conduct on the part of the mortgagees.

Thus where a bond and mortgage, given for the purchase money of land, dated June 27th, 1855, and payable on the 27th of June, 1860, with interest half yearly, contained a provision that should any default be made in the payment of the interest when due, and the same should remain unpaid for twenty days, that then the principal sum should, at the option of the mortgagees, become payable immediately; the mortgagor, at the time of executing the mortgage, receiving from the mortgagees a written agreement that they would, within ninety days, cause a judgment which was a lien on the premises to be canceled, &c.; and the same was canceled, on the 31st

of December, 1855, but no notice thereof was given to the mortgagor, and the latter, under the impression that the judgment was still a lien upon the premises, omitted to pay the half year's interest which was due on the 27th of December, 1855; and the twenty days mentioned in the bond having expired, without the interest being paid, or demanded, the mortgagor was, on the 24th of January, 1856, required by the mortgagees to pay the principal and interest on his bond and mortgage, they claiming the whole to be due; and the mortgagees, after refusing to accept a tender of the interest due, with interest thereon, commenced a suit to foreclose the mortgage; *Held* that the conduct of the mortgagees in attempting to enforce the forfeiture, instead of apprising the mortgagor of the discharge of the judgment, and in due time, before the expiration of the twenty days, claiming the payment of the interest, was unreasonable and oppressive, and their complaint was dismissed. SUTHERLAND, J., dissented.

APPEAL from a judgment entered at a special term, after a trial at the circuit. The case presented the following facts: On or about the 27th of September, 1855, the plaintiffs agreed with the defendant that they would, on the 2d of November following, convey certain premises to him, on receiving (in addition to $1500 which they had already received as part of the purchase money) the sum of $500 and his bond and mortgage (containing the usual twenty days interest clause) on the premises for $4000, payable on the 27th day of June, 1860, with interest half yearly; such conveyance, bond and mortgage, to bear date 27th June, 1855. They also agreed that in case of their neglect or refusal to make such conveyance, they would pay back to him the said sum of $1500 so already received by them. On the 2d of November, 1855, the defendant was ready and offered to perform the agreement on his part; but the plaintiffs were then unable to give an unincumbered title to the premises, by reason of a judgment for $518.18, which had been obtained against them and docketed in July previous, and which remained uncanceled and was a lien on the premises. The defendant, at the solicitation of the plaintiffs, consented to waive his right to rescind the agreement and to receive back the $1500, and was induced by them to accept a conveyance from them of the premises, and to pay the additional $500, and to give

his bond and mortgage, containing the twenty days interest clause, for $4000, on receiving from them a written agreement that they would, within ninety days from that time, cause the lien of the judgment for $518.18 to be canceled, or deposit the amount of such judgment in his hands, to be held until the same should be discharged. The first half year's interest on the bond became due on the 27th of December, 1855. The plaintiffs procured the judgment against them to be canceled on the 31st of January, 1855, but no notice or information was given to the defendant, nor had he any knowledge of such cancelment until the 25th of January, 1856. The twenty days mentioned in the bond expired on the 17th day of January, 1856; the interest which became due on the 27th December not having been paid by the defendant before such expiration. On the 24th January, 1856, the defendant was required by the plaintiffs' attorneys to pay the *principal* and interest on his bond and mortgage. He thereupon caused the interest to the 27th of December, 1855, with interest upon such interest to that date, to be tendered to the plaintiffs and to their attorneys, which tenders were refused, and this action for the foreclosure of the mortgage commenced. On the 5th March, 1856, after the commencement of this suit, the defendant's attorney offered the said interest, with interest thereon, together with the costs of the plaintiffs then incurred, to one of their attorneys, to the end that the complaint might be dismissed without prejudice to the rights of the plaintiffs on any subsequent failure of the defendant to pay the interest on the bond and mortgage; which offer was declined, and the money so offered was then paid into court in this action.

The judge at special term dismissed the complaint; and the plaintiffs appealed.

A. C. Bradley, for the appellants. I. Whether the bond and the undertaking concerning the judgment are considered as parts of the same transaction or different transactions, and

whether they are considered as the same or as different instruments, the effect is the same. By the one the defendant undertook to pay interest on the 27th of December; by the other the plaintiffs undertook to remove the judgment by the 1st of February, or to deposit the amount of it in the defendant's hands. Neither of these papers separately, nor both together, made the payment of interest conditional upon the removal of the judgment. The payment was to be made absolutely, and, at all events, at an early period. The removal of the judgment remained optional until a later period. The defendant's debt was certain to fall due on the 27th December. It was not certain that the debt of the plaintiffs (the amount of the judgment in default of its removal) would ever be due, and if it should ever become due, that event could by no possibility occur before the first of February; and, in point of fact, it never did fall due at all—the judgment having been removed on 31st December, a month before the option expired. Of course, if the payment of interest was not dependent upon the removal of the judgment, the plaintiffs were not bound to give notice of the removal in order to entitle them to payment.

II. By the non-payment of the interest within twenty days after it fell due, the whole amount of principal became due. If the plaintiffs and the defendant had the right to buy and sell the land, they had the corresponding right to determine the time of payment, or the duration of credit. They had the right to make that term either absolute or dependent on conditions, or make it absolute for a certain period and conditional for a certain other period beyond, or make it four years, with a proviso that on the sooner happening of any specified event, the credit should terminate. What that event should be, was just as much within their jurisdiction as the amount of price, or any other act of free agency. It may be selected by reason or by caprice. If they had the capacity to contract at all, they had the capacity of making the time

of the final performance of the contract depend upon the omission to pay interest.

A principle which cannot be denied without denying to men who are *sui juris* the right of contracting, does not depend on adjudged cases, though adjudged cases may illustrate it. (*State* v. *Bradford*, 4 *Taunt.* 227. *James* v. *Thomas*, 5 *B. & Adol.* 40. *Noyes* v. *Clark*, 7 *Paige*, 179. *Norton* v. *Wood*, 1 *Russ & Myl.* 178. 18 *Vesey*, 56, 58, 59 *and* 62. 14 *id.* 140. 16 *id.* 405. 13 *id.* 433, *&c.* 4 *How. Pr. Rep* 576.) Now this right, which the plaintiffs and defendants possessed, they undoubtedly meant to exercise. The provision for the twenty days clause was inserted in Parfitt's contract. When the defendant bought him out, he had it inserted in his own. And when *that* came to be performed, the clause was inserted in both the bond and mortgage, in language the most explicit. Both parties meant to agree, and agreed, that the interest should be punctually paid, or that the loan should end. (*Hepwell* v. *Knight*, 1 *Younge & Coll.* 415. *Hale* v. *Gouverneur*, 4 *Edw. Ch.* 207. *Dimon* v. *Dunn*, 15 *N. Y. Rep.* 498.)

III. The plaintiffs, in insisting on the letter, insist on its spirit also. They are not exacting a forfeiture, but enforcing a just contract. Millions of money are lent on mortgage in full reliance on punctual payment of interest. And it is for the good of society, that when debtors fail to pay interest, creditors should have the right to terminate the loan. And when debtor and creditor have, in just and fair terms, agreed how far punctuality shall extend the loan, and how far the want of it shall abridge it, it is for the still greater good of society that the courts abstain alike from altering the terms of the contract and from impairing the rights of parties under it.

IV. As to the defendant being thrown off his guard, his answer is not evidence, and there is no proof on the subject. The arrangement about the judgment was perfectly plain and simple. The plaintiffs were to remove it in 90 days from the 2d of November, or pay the amount of it into his hands

So, too, the arrangement about the interest was perfectly plain and simple. The arrangement was to pay it in twenty days after the 27th of December, or the whole principal would become due, and the loan would terminate. A man who understands any thing can understand both. And there is nothing in either singly, or in both together, sufficient to have thrown the defendant off his guard. If that allegation had not been found in his answer, there is nothing in any fact proved which would even suggest the possibility of such a thing.

R. Emmett, for the respondent. I. The object of the twenty days clause was to induce punctuality in the payment of the interest, not to make a *new contract* for the payment of the principal at an earlier day. The punctual payment of the interest was the actual purpose of the condition; the liability consequent on its non-performance was the *mere accessory*. The demand, therefore, for principal, on failure to pay the interest within twenty days, is the exaction of a *forfeiture or penalty:* it is not a demand for the performance of a contract. In all cases where the payment of money appears to have been intended only to secure the performance of the main object of the agreement, the law views it as a penalty. (*Sloman* v. *Walter*, 1 *Bro. Ch.* 418. *Graham* v. *Bickham*, 4 *Dall.* 149. *Merrill* v. *Merrill*, 15 *Mass.* 488. *Skinner* v. *Dayton*, 2 *John. Ch. R.* 535. *Sanders* v. *Pope*, 12 *Ves.* 282. *Davis* v. *West*, *Id.* 475.)

II. The twenty days clause is in this respect within the principle that *covenants* to pay a larger sum as *liquidated damages* on failure, &c. shall be held to be merely *penalties*. "If the instrument provides that a larger sum shall be paid on the failure of the party to pay a less sum in the manner prescribed, the larger sum is a penalty, whatever may be the language used in describing it." (*Per Sandford, J. Beale* v. *Hayes*, 5 *Sandf.* 640. 2 *Parsons on Cont.* 440, *note, and cases cited. Id.* 22, *note.*)

III. Courts will relieve even against express covenants, where the enforcement would operate as penalties; and where they have been introduced merely to make more certain the due performance of the actual contract between the parties, and are *mere accessories*, therefore, to such contract; and where the thing claimed cannot be supported as an *independent* covenant, divested of any operation as a penalty, relief will always be granted against its execution. (*Marquis of Halifax* v. *Higgins*, 2 *Vern.* 134. *Hollis* v. *Wyse*, *Id.* 289. *Shode* v. *Parker*, *Id.* 316. *Nicholl* v. *Maynard*, 3 *Atk.* 519. *Bonaface* v. *Rigbot*, 3 *Burr.* 374.)

IV. The twenty days clause is analogous to a clause for re-entry in a lease, for non-payment of rent. If the tenant, at any time before trial, pays or tenders all the arrears of rent, with the costs, the proceedings in ejectment shall cease. (*Roe* v. *Davis*, 7 *East*, 363. *Downes* v. *Turner*, *Salk.* 597. *Philips* v. *Doolittle*, 8 *Mod.* 345. *Smith* v. *Parks*, 10 *id.* 383. 2 *John. Ch.* 535.)

V. The case comes also within the principles of equity on which relief against forfeitures is granted as between mortgagor and mortgagee. (*See* 4 *Kent's Com.* 157–162, *and cases cited; Story's Eq. Jur.* §§ 1313, 14, 16, 21; *also* §§ 775, 776, *and cases there cited.*)

VI. But whether the twenty days clause be viewed in the light of a penalty or of a strict contract, the peculiar circumstances of this case entitle the defendants to relief. And those circumstances—such as the subject matter of the contract, the situation of the parties, the usages to which they may be understood to have referred, and all other facts and circumstances of their conduct—may be looked into and should be considered. (*Perkins* v. *Lyman*, 11 *Mass. Rep.* 76, 81.) The contracts must be construed together. (2 *Pars. on Cont.* 15, *note a, and cases cited.*)

VII. The plaintiffs, on the 2d November, 1855, undertook, in writing, that within ninety days they would do *one of two things;* either have the lien of the judgment removed, or de-

posit the amount of it in the defendant's hands. This was a contract on their part for the performance of either alternative, of which they reserved to themselves a space of time extending thirty-five days beyond the day when the interest would become due by the terms of the bond, and fifteen days beyond the succeeding twenty days. They had the *option* to do either of those things, and were therefore bound to give notice to the defendant as to which they elected to do; or, having actually elected to cancel the judgment, they were bound to inform the defendant of such election. "Where any option at all remains to be exercised on the part of the plaintiff, notice of his having *determined that option*, ought to be given, &c." (*By Baron Parke, in Vyse* v. *Wakefield*, 6 *Mees. & Wels.* 442. *S. C.*, 7 *id.* 126. 2 *Parsons on Cont.* 182, *note* 5.)

VIII. The canceling of the judgment, (which was their election,) being an act which they alone *could* do, they were bound to give notice of it to the defendant, when done. The doing of it lay not only within their exclusive power, but within their *peculiar knowledge*. It is a general rule that when the happening of an event which calls for the performance of a duty by one party to another, lies more properly within the knowledge of the latter than of the former, notice from the party having such knowledge, to the other, is necessary. (*Per Lord Abinger, in Vyse* v. *Wakefield, ut supra.* 2 *Parsons on Cont.* 183, *note.* 2 *Saund.* 62 *a*, *note* 4.)

IX. If the plaintiffs' undertaking to cancel the judgment or deposit the amount of it within ninety days, and the defendant's undertaking to pay interest on his bond, are to be viewed as independent covenants; neither being conditioned upon the other, it makes the case stronger *in equity* for the defendant. If the ninety days had expired without the lien being removed or the amount deposited with the defendant, and the plaintiffs (refusing to do either,) had sued on the bond and mortgage, no court, exercising equitable powers, would refuse to grant an injunction against such suit, on a com-

plaint by the defendant to compel a specific performance of the plaintiffs' agreement. The equity of the case would necessarily embrace the rights and claims of both parties growing out of the same transaction; and the fact that the lien had actually been removed before the expiration of the ninety days, does not weaken the defendant's equity in this case, because the plaintiffs kept him in ignorance of that fact. *De non existentibus et non apparentibus eadem est ratio.* Covenants originally independent may become dependent by the acts of the parties under them. (*Beecher* v. *Conradt*, 3 *Kern.* 108.)

X. The case shows surprise and hardship on the defendant, from the course pursued by the plaintiffs; and on that ground the decision of the special term should be affirmed.

CLERKE, J. This is an action to foreclose a mortgage under the following circumstances:—In September, 1855, the plaintiffs agreed with the defendant that they would convey certain premises to him on the second of November following, on receiving from him five hundred dollars, in addition to fifteen hundred dollars, which they had already received from him. It was also agreed, that he should give them his bond for four thousand dollars—the remainder of the purchase money—to be secured by a mortgage on the premises, payable on the 27th day of June, 1860, with interest payable half yearly. The conveyance, bond and mortgage were to bear date 27th of June, 1855. The bond and mortgage contained a clause, that should any default be made in the payment of the interest, or any part thereof, on any day when the same was made payable, and should the same remain unpaid for twenty days, that then the principal sum ($4000) should, at the option of the plaintiffs, become payable immediately thereafter. On the 2d of November, 1855, the defendant was ready and offered to perform the agreement on his part; but the plaintiffs were unable to give an unincumbered title to the premises by reason of a judgment, which had been docketed

against them in July previous; and which remained uncanceled, and was a lien on the premises. The defendant consented, at the solicitation of the plaintiffs, to waive his right to rescind the agreement and receive back the $1500, and was induced by them to accept a conveyance of the premises, to pay the additional $500, and to give his bond and mortgage for the $4000, containing the above mentioned clause. He, at the same time, received from them a written agreement, that they would, within ninety days, cause the judgment to be canceled, or would deposit the amount of said judgment in his hands, until it should be discharged. This arrangement was made on the said 2d day of November, 1855. The first half year's interest, according to the terms of the bond, became due on the 27th of December, 1855; the plaintiffs procured the judgment against them to be canceled on the 31st of December, 1855, but no notice was given to the defendant of the cancelment, nor had he any knowledge of it until the 25th of January, 1856. The twenty days mentioned in the bond expired on the 17th of January, 1856; on the 24th of January, the defendant was required by the plaintiffs' attorneys, without any previous intimation from the plaintiffs or any other person, to pay the principal and interest on his bond and mortgage. He, thereupon, caused the interest to the 27th of December, 1855, with interest upon that interest to date of tender, to be tendered to the plaintiffs and their attorneys. The tender was refused; and this action was commenced, to foreclose the equity of redemption in the premises.

It will be seen, from this statement, that the defendant allowed the twenty days for payment of interest to elapse, under the impression that the plaintiffs had not procured the judgment, which was a lien on the premises, to be canceled. When the interest became due, on the 27th of December, 1855, the judgment remained uncanceled; after it was canceled, no notification of it was given to the defendant; and no demand of interest was made, or the slightest intimation given, that payment of it would be required, according to the

strict terms of the bond. Usually, when no stratagem is intended, the obligee calls or sends for this interest. But, the plaintiffs allowed the twenty days to elapse without uttering a hint; when they supposed that the default was irrevocable, and that they were entitled to exact prompt payment of the whole principal and interest; and on failure of this, to foreclose the defendant's equity of redemption. Nothing was more natural, under these circumstances, than for the defendant to suppose that the plaintiffs would not require the payment of the interest ($140) until the lien on his property (for $518.18) should be canceled; and, I think, it was contrary to all equitable dealing for the plaintiffs to take advantage of these circumstances, instead of apprising the defendants of the cancelment, and in due time, before the expiration of the twenty days, claiming the payment of the interest. This was oppressive and unreasonable conduct on the part of the plaintiffs; and one of the principal and benign functions of a court of equity is to afford protection against such conduct, when a suitor attempts to avail himself of it by the instrumentality of a strict legal right. And more especially in a case like the present, when the plaintiffs seek the interposition of a court of equity to enforce a remedy, under circumstances which no court can avoid considering unconscionable, it will refuse to give its aid and countenance for such a purpose.

If there is any one action more than another pre-eminently the subject of jealous supervision by courts of equity, it is the action now under consideration. All transactions between mortgagor and mortgagee, have been always closely scrutinized by them; and, when the latter has taken advantage in any way of the former, or where there has been any detriment or hardship resulting from the inequality of their relative positions, and when there has been a mistake, injurious to the former, of which the latter ought in conscience to have apprised him, a court of equity so far from lending its assistance to consummate the wrong, will interpose to repair it. This is not an arbitrary interference with the substantial and essential

provisions of a contract; it is shielding innocent or unfortunate persons against the unscrupulous perversion of them; it is interposing to prevent the employment of legal forms for purposes, which legal forms were never designed to promote. The action to foreclose an equity of redemption, and indeed permitting an equity of redemption to exist, by courts of equity, is a proof of this. It was instituted for the express purpose of mitigating the hardship of a strict legal right. By the terms of the mortgage, if the day limited should pass without payment of the debt and interest, the estate, as we all know, would absolutely vest in the mortgagee, to the extent to which it is conveyed, free from the claims of the mortgagor. Courts of equity, seeing that it might perhaps be forfeited, according to the letter of the instrument, for a sum equivalent to a small portion of its actual value, interposed, and ordained that the mortgagor must have a further opportunity of paying what is due, and of redeeming the land. Now, this is sanctioned and regulated by statute; and the mortgagee so far from being entitled to the ownership of the land, as provided in the contract, is only entitled to have it sold after due notice, and a considerable lapse of time; and, if it bring more than the debt, the mortgagor is entitled to the surplus. If the court, then, has power to interpose, so as to change the whole character and effect of the instrument, it assuredly has power to mollify the effect of a single clause of it, relating to the period limited for the payment of interest. All that the mortgagee in either case ought to require is, that he should be secured against injury, and that he should derive all the benefit, that natural justice demands.

The judgment of the special term should be affirmed with costs.

DAVIES, J., concurred.

SUTHERLAND, J. (dissenting.) I cannot agree with my associates in their conclusion to affirm the judgment of the

special term in this case. I think that judgment should be reversed with costs.

On the 2d day of December, 1855, the plaintiffs conveyed to the defendant, Smith, a certain lot of land in the city of New York, for the consideration of six thousand dollars, and at the same time Smith executed to the plaintiffs his bond and a mortgage on said premises for four thousand dollars of the consideration money. The bond and mortgage were dated back, the 27th day of June, 1855, for reasons stated in the defendant's answer, which are admitted by the plaintiffs; and the case stands precisely as if the bond and mortgage had been executed on the 27th day of June, 1855, the day they bear date. The bond was conditioned for the payment of the said sum of four thousand dollars, on the 27th day of June, 1860, with interest thereon half yearly. The condition of the bond also contained a special agreement, that in case the interest, or any part thereof, should not be paid on the day when the same was payable, and should remain unpaid and in arrear for the space of twenty days, then the principal sum of four thousand dollars, with all arrears of interest thereon, should, at the option of said plaintiffs, become due and payable immediately thereafter, although the period first above mentioned for the payment of the principal sum might not have expired. On the 27th day of December, 1855, one half year's interest fell due. It was not paid on that day, and remained unpaid for twenty days thereafter; and thus the principal as well as interest was due and payable on the 16th day of January, 1856, according to the special agreement inserted in the condition of the bond. The mortgage recites the condition of the bond, including the special clause or agreement by which the whole principal was to be due and payable, in case the interest remained due for twenty days; and was given to secure the payment of the bond. On the 22d day of January, 1856, the plaintiffs' attorneys notified the defendant, that the bond and mortgage had been placed in their hands for collection, and that the same had by the terms thereof become due and payable. This

suit was commenced on the 4th day of February, 1856, to foreclose the mortgage, the plaintiffs claiming that the principal as well as interest was due and payable. On the 25th day of January, 1856, the defendant offered to the plaintiffs' attorneys the half year's interest, which fell due on the 27th day of December, 1855, with interest on the interest, and to stipulate in writing to pay the costs of the plaintiffs in this action, on their being adjusted. This offer was declined. On the third day of November, 1855, the plaintiffs were unable to give an unincumbered title to the premises, by reason of a judgment for $518.18, which had been recovered against them in July previous, and which was a lien on the premises. But the defendant, at the request of the plaintiffs, consented to accept and did accept the deed, and execute the bond and mortgage, on the plaintiffs executing to him a written agreement, that they would within ninety days from that time, cause said judgment to be canceled or removed, so that the same should cease to be a lien, or deposit the amount of the judgment in the hands of the defendant, to be held until such judgment should be discharged. The judgment was canceled on the 31st day of December, 1855, but the defendant received no notice thereof, nor had he any knowledge of such cancelment, until the 25th day of January, 1856. On these facts, the defendant having paid into court the interest due on the 27th day of December, and the interest thereon, the judgment of the special term was, that the complaint should be dismissed.

Now there not being in this case a pretense of any surprise, mistake or fraud in the execution of the papers or agreements, out of which the rights of the parties arise, I do not see how the judgment of the special term can be sustained, without setting aside the agreement which the parties themselves made, and making a new one for them. The plaintiffs having the right of disposing of their property, the principle is clear, that they had the right of disposing of it on such terms as they thought proper to fix, provided they were not illegal, or

so unreasonable that the law would presume them void. (*Roe* v. *Galliers*, 2 *T. R.* 133.) Was the agreement of the defendant, that if the interest remained unpaid for 20 days, then the whole principal sum should be due and payable, illegal, or so unreasonable that the law pronounced it void? It was neither illegal nor unreasonable. Why then should it not be enforced? If public policy, *not declared either by the common law or by statute*, is a legitimate principle, upon which either courts of law or of equity, can declare contracts between individuals void, (which I do not admit,) what has public policy to do with the time or the contingency at which or upon which, a simple contract debt shall become due or payable? It is the policy of the law and of the public, that individuals should be left to make their own bargains and regulate their own affairs, except as restrained by law, or their public duties. Admitting that there are certain cases, in which a court of equity will relieve from a forfeiture, upon what principle is it said, that the plaintiffs in this action seek to enforce a forfeiture? They seek to foreclose their mortgage because they say it is due. If it is due, it is a common case of foreclosure; and the foreclosure of this mortgage is no more the enforcement of a forfeiture, than any other case of foreclosure.

Is the mortgage due? It is, if the defendant's express agreement is valid, and is to be enforced. Is the enforcement of it, the enforcement of a forfeiture? If enforced, what will the defendant have to pay? The principal and interest. If not enforced, and the defendant is relieved from his own default, what will he have to pay in 1860, when the mortgage becomes due, without reference to the special interest clause? Principal and interest, and nothing more. How can the enforcement of the payment of a debt, with the legal interest and nothing more, be called the enforcement of a forfeiture? What would the defendant have forfeited, by paying his debt with interest in 1856, rather than in 1860 with interest; the rate of interest being fixed by law; he paying the same rate in either case? Had money cheapened, and the defendant

been able to procure the principal at five per cent, and pay off the mortgage in 1856, he certainly would not have complained, nor called his payment then a forfeiture. As he agreed to pay seven per cent—the lawful interest—how could the payment of the mortgage, with seven per cent, in 1856, be called a forfeiture? I can see no reason for calling this foreclosure the enforcement of a forfeiture. The plaintiffs ask for no more than they bargained for; and the defendant could not have been compelled to pay any more than he agreed to pay. The parties agreed, that in default of the payment of the interest for a certain number of days, the whole principal should be due and payable sooner than it otherwise would. It was lawful for them so to agree, and if the default happened—if the contingency occurred—the principal thereupon became due and payable, by the agreement of the parties, in 1856, as it would have done in 1860, without such special agreement. What more is there in this case? Was it the plaintiffs' fault, or owing to their laches, that the defendant did not pay the interest within the twenty days? What equity has the defendant, what grounds for relief, growing out of the plaintiffs' agreement to discharge the judgment, which was a lien on the mortgaged premises, executed at the same time the bond and mortgage were executed? The plaintiffs, by their agreement, agreed to cancel the judgment, or to deposit the amount thereof in the hands of the defendant within ninety days; say, on or before the first day of February, 1856. The defendant, by his bond or agreement, executed at the same time, agreed to pay one half year's interest on the $4000, to the plaintiffs, on the 27th day of December, 1855. How can the defendant say that his payment of the interest on the 27th of December, 1855, was dependent on the plaintiff's discharging or depositing in his hands the amount of the judgment on the 1st of February, 1856—more than a month after the interest became due? Did the plaintiff's agreement to discharge the judgment within three months, revoke the defendant's agree-

ment to pay the interest within two months? The parties must be presumed to have known and understood what they mutually agreed to, and to have intended then to fulfill their respective agreements.

The agreements were in no way dependent upon each other. The defendant's undertaking to pay the interest was not upon condition that the plaintiffs should remove the lien of the judgment.

To permit the defendant to set up in this action, in bar of the plaintiff's right of foreclosure, the want of notice that the judgment had been canceled before the twenty days expired, is in effect to make a new contract between the parties, and by it to take away the plaintiff's rights, under the agreements actually made by the parties themselves. The judgment was in fact canceled or removed on the 31st day of December, 1855. Neither the plaintiff's written agreement, nor any principle of equity or fair dealing, outside of it, that I can see, called upon the plaintiffs to notify the defendant that the judgment had been canceled, as a condition of their right to exact from the defendant the fulfillment of his agreement. The defendant had no right to expect, or to wait for such notice before he paid the interest. If he had gone and paid the interest at any time within the twenty days, it would have been natural for him to have asked whether the judgment had been canceled, and he then would probably have been informed that it had.

If the plaintiffs had not removed the lien of the judgment, or deposited the amount thereof with the defendant, within the ninety days as agreed, then the amount of the same should have been deducted from the mortgage; but I cannot see how a breach of the plaintiff's agreement, on the 1st of February, could have justified a breach of the defendant's agreement on the 27th of December previous, and the continuous default of the defendant, for twenty days thereafter.

Outside of the agreement I do not find an act or a declaration of the plaintiffs to mislead the defendant, and estop them

from enforcing their rights under the written contracts. I think, therefore, the judgment of the special term should be reversed, with costs.

Judgment affirmed.

[New York General Term, February 1, 1858. *Davies, Clerke* and *Sutherland*, Justices.]

26 55
23a 51
50a 61

Ruse *vs.* The Mutual Benefit Life Insurance Company.

The plaintiff insured the life of B. in the defendants' company, in the sum of $2000, for the term of life, agreeing to pay an annual premium of $97.40, on or before the 10th day of April in every year. And it was provided in the policy that in case the plaintiff should not pay the premium on or before that day, the company should not be liable to pay the sum insured, and the policy should cease and determine. On the plaintiff's making application for insurance, the defendants' agent handed to him a pamphlet issued by the company, entitled "Prospectus" &c. which contained these clauses: "Every precaution is taken to prevent a forfeiture of policy. A party neglecting to settle his annual premium within thirty days after it is due, &c. forfeits the interest he has in the policy." The premium for the second year was not paid on the 10th day of April. B. died on the 14th of that month. After the defendants' agent had heard of B's illness, and on the 13th of April, the plaintiff tendered to the agent the premium, which the latter refused to receive. *Held* that the prospectus issued by the company was to be regarded as a waiver of the forfeiture incurred by the non-payment of the premium on the 10th of April; and that the defendants, after having by such prospectus induced the plaintiff to omit the payment when due. and to rest upon the assurance contained in the prospectus, of a further credit of 30 days, could not be allowed to insist upon the forfeiture as a defense, in an action upon the policy.

Held also, that whether the prospectus was held to be a *waiver* of the forfeiture, or to *estop* the defendants from insisting on it, was immaterial; that in either view they had no defense to the suit, and the plaintiff having tendered the second year's premium within the 30 days, was entltied tto recover.

Held, further, that the plaintiff's application for the insurance, which was accepted by the defendants, and in which the plaintiff stated that he had an interest in the life of B. to the full amount of $2000, was sufficient proof of such interest, as between the parties, if any proof of interest was necessary.

Ruse *v.* Mutual Benefit Life Insurance Company.

APPEAL from a judgment recovered at a special term. The complaint averred that the defendants were duly incorporated and organized as a corporation in 1845. That on the 15th of July, 1846, at Columbus, in Georgia, they made a policy of insurance to the plaintiff, on the life of Ira D. Bugbee, of Florida, for the term of his life, and for the sum of $2000, for the sole use of the plaintiff. That the premium was paid, and the policy delivered to him on said 15th July. That Bugbee died on 14th April, 1847, and due notice was given to the defendants. The plaintiff prays judgment for $2000, and interest from 14th April, 1847. The answer averred that the policy was on the condition that the premium should be paid on or before the 10th of April in each year. That the premium for the second year was not paid on the 10th of April, 1847. That Bugbee died after such 10th April, 1847. Wherefore, the defendants denied their liability. On the trial the policy was read in evidence. It contained no date, except that it purported to be "countersigned at Columbus, the 15th day of July, 1846," and was indorsed by the defendants, "dated 10th April, 1846." It was proved that Charles Mygatt was the defendants' agent at Columbus, Georgia, in 1846 and part of 1847. That the application for the insurance was made to Mygatt, in Columbus, in April or May, 1846, and by him transmitted to the defendants, in New York, in July, 1856. That in July, 1846, Mygatt received the policy from the defendants, and delivered it to the plaintiff, who then settled with him the year's premium, $97.40. That Bugbee died on or about 13th April, 1847; and after Mygatt had heard of his death, and on said 13th April, 1847, the plaintiff tendered to him the second year's premium, which he refused to receive. That when the plaintiff made his application for the insurance, in April, 1846, Mygatt, the agent, handed to him a pamphlet issued by the defendants, entitled "Prospectus," &c. which contained these clauses:

"20th. Every precaution is taken to prevent a forfeiture of policy."

"A party neglecting to settle his annual premium within thirty days after it is due, &c. forfeits the interest he has in the policy." Which "Prospectus" was read in evidence. The plaintiff also gave in evidence another pamphlet entitled "Prospectus" &c., issued by the defendants after the death of Bugbee, which contained this additional clause: "If the annual premium is paid within the thirty days mentioned above, (the party being in sound health,) the policy will be renewed by the company without extra charge." And omitted the clause about preventing forfeitures of policy. The defendants gave in evidence the application for the insurance, signed by the plaintiff, which contained these averments, viz: "I have an interest in the life of the said J. D. Bugbee to the full amount of the said sum of $2000, and I hereby agree that this declaration shall be the basis of the contract between myself and the said company," &c. The defendants also gave in evidence the laws of Georgia and of New Jersey against gaming. The defendants, on these facts, insisted—1. That by omitting to pay the premium on the day mentioned in the policy it was forfeited, and that the prospectus could not alter the policy. 2. That there was no proof or allegation of interest. 3. That there was a variance between the pleadings and proof, in this, that it was averred that the insurance was for one year from 15th July, 1846, while the proof was that it was from 10th April, 1846. The judgment was for the plaintiff for $3583.30 principal, interest and costs. The defendants appealed to the general term.

A. C. Bradley, for the appellants.

J. W. Edmonds, for the respondent.

By the Court, SUTHERLAND, J. The policy or contract of insurance in this case was not a contract from year to year, dependent for its continuance upon the payment of the premium on or before the 10th day of April in each year; but it

was an *assurance of the life of Ira D. Bugbee for the term of life*, for the sole use of the plaintiff, subject to be defeated by the non-payment of the annual premium on any 10th day of April. The words of the policy are, that the defendants, "in consideration of the sum of ninety-seven dollars and forty cents to them in hand paid, by John C. Ruse, and of the annual premium of ninety-seven dollars and forty cents to be paid on or before the 10th day of April, in every year during the continuance of this policy, do assure the life of Ira D. Bugbee, of Apalachicola, in the county of Franklin, state of Florida, in the amount of two thousand dollars, for the term of life, for the sole use of said John C. Ruse." In a subsequent part of the policy, it was agreed and provided, that "in case the said John C. Ruse shall not pay the said annual premium on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable to the payment of the sum or any part thereof; and this policy shall cease and determine." The policy is without date; but was countersigned by the defendants' agent, at Columbus, Georgia, on the 15th day of July, 1846, and delivered by him to the plaintiff, on or about that day; the plaintiff, at or about the time of the delivery, paying to the agent $97.40, one year's premium. When the plaintiff made his application for the insurance, in April, 1846, the defendants' agent handed to him a pamphlet issued by the defendants, entitled "Prospectus," &c. which contained these clauses:

"20th. Every precaution is taken to prevent a forfeiture of policy."

"A party neglecting to settle his annual premium within thirty days after it is due, &c. forfeits the interest he has in the policy."

The premium for the second year was not paid on the 10th day of April, 1847. Bugbee died on the 14th day of April, 1847, and due notice of his death was given to the defendants. After the defendants' agent had heard of Bugbee's illness,

and on the 13th day of April, 1847, the plaintiff tendered to the agent the second year's premium, which the agent refused to receive. The plaintiff brings this suit to recover two thousand dollars, the amount for which the life was insured and interest.

The defendants insist on the fact, that the second year's premium was not paid on or before the 10th day of April, according to the terms of the policy, as a defense.

The question in the case, we think, is, admitting, according to the terms of the policy itself, such default in the payment of the premium to be a good defense to the plaintiff's claim, whether the defendants are not estopped by their own act and declaration—their "Prospectus"—from setting up and insisting upon such default, as against the plaintiff's claim. We think they are so estopped. The policy is one entire contract of insurance, not from year to year, as the premiums should be paid, but for the whole term of the life of Bugbee, on condition, that if the annual premium was not paid on the 10th of April, the policy should cease and be void. The question is not, therefore, as the counsel of the defendants, on the argument, seemed to suppose, whether the "Prospectus" issued by the company, substantially declaring that the plaintiff should have thirty days after the 10th of April within which to pay the premium, without incurring a forfeiture, could or did operate as a *continuance* of the policy after the 10th of April; but the question is in this case, whether the "Prospectus" may not be looked upon as a waiver of the forfeiture by the defendants, or whether they can now set up the condition of forfeiture in the policy against their own written declaration to the plaintiff, with reference to which it is to be presumed the plaintiff accepted the policy and neglected to pay the annual premium punctually on the 10th of April, 1847. If the defendants, by their "Prospectus," induced the plaintiff to act as he did, and rest upon its assurance of a credit of thirty days from and after the 10th of April, for the payment of the premium, then the forfeiture was caused by

their own act; and it certainly would not be right or legal to permit them to take advantage of a forfeiture which they were the cause of. It is quite immaterial, whether the "Prospectus" of the company is held to be a waiver of the forfeiture, or to estop them from insisting upon it in this case; in either view they have no defense; and the plaintiff having tendered the second year's premium, within the thirty days, is entitled to recover.

An estoppel is where one having willfully, by act or words, induced another to act in a particular way, is not permitted by the law to gainsay such act or words, to the injury of such other, even by speaking the truth.

Upon the question of the defendants' right to insist upon a forfeiture of the plaintiff's interest in the policy in this case, the case of *Buckbee* v. *The United States Ins. Co.*, (18 *Barb.* 541,) appears to be in point against such right, and the general principles of justice upon which estoppels are permitted to operate, certainly justify their application in this case.

As to the other point raised by the defendants, that there was no proof that the plaintiff had an insurable interest in the life of Bugbee, we think that the plaintiff's application in writing for the insurance, which was accepted by the defendants, and in which the plaintiff stated that he had an interest in the life of Bugbee to the full amount of the sum of $2000, sufficient proof of such interest as between the parties, if any proof of interest was necessary.

The judgment appealed from must be affirmed with costs.

[New York General Term, February 1, 1858. *Davies, Clerke* and *Sutherland*, Justices.]

26 562
19h 267

WILSON and others *vs.* BRITTON.

A threat by a debtor, when proposing a compromise with creditors, that if they do not accept one-third of their debt, he will make an assignment of his property, and such creditors will not get any thing—that he will put his property out of his hands—is not necessarily a threat to make a *fraudulent* disposition of his property, so as to authorize the issuing of an attachment.

In the absence of any proof of a fraudulent intent, derived from contemporaneous or subsequent acts, the declaration will be construed as referring to a *legal* disposition of the debtor's property.

APPEAL from an order made at a special term, denying a motion to vacate an attachment. The affidavit of the plaintiff Wilson, upon which the attachment was granted, stated the indebtedness of the defendant to him, upon several promissory notes, and for goods sold and delivered; and alleged that on the 19th of December, 1857, the deponent called upon the defendant, at the city of New York, for payment; that the defendant said he would not pay the same; that he wished to make a compromise with his creditors at 33⅓ per cent on the dollar, with the exception of confidential debts, and that if the deponent did not agree to take this, "he would go home and make an assignment of his property, and that the plaintiffs would not get any thing of their said claims, and that he would put his property out of his hands sooner than pay them more than 33⅓ per cent of the amount of his debts;" and upon the deponent's firm refusing to take less than the amount of their claim, the defendant declared "he would go home and put his property out of his hands;" which the deponent verily believed the defendant was about to do, in order to defraud his creditors and the plaintiffs in this action. The facts stated in Wilson's affidavit were denied by the defendant.

John Foot, for the appellant.

Jas. T. Brady, for the plaintiffs.

By the Court, CLERKE, J. I do not find, even in the affidavit presented on behalf of the plaintiffs, any thing to convince me that the defendant, in his conversation with the plaintiffs, on the occasion referred to in the plaintiffs' first affidavit, intimated any thing more than that he intended to make an assignment. If his declaration admits of this construction, merely, why should we infer that he intended fraud. This would be contrary to the benign principle that we are not to presume wrong until wrong is plainly indicated. Of course we are not obliged to confine our interpretation to mere words; but if we seek for his intent from any other source, it must be to give effect to his words. In this case the defendant's conduct by no means corresponds with the construction given to his conversation, referred to in the plaintiffs' affidavit. He attempted no fraudulent disposition of his property; but, subsequently, made a legal and valid assignment of his property for the benefit of his creditors. Does his language, set forth in the plaintiffs' affidavit, even supposing it to be reported correctly, fairly import any thing more than this? "He would go home and make an assignment of his property, and that the plaintiffs would not get any thing of their claims. He would put his property out of his hands." He stated how this was to be done—by making an assignment. This was no threat to make a fraudulent disposition of his property. On the contrary, it was a perfectly legal disposition of it—a disposition of it, also, entirely consistent with the fact that the result would be that the plaintiffs would not get any thing of their claims. For he may give preferences, which the law also allows; and by providing full payment to some creditors, nothing may be left out of the assets for others. We cannot, therefore, I think, sustain this attachment without presuming an evil intent, when the words employed admit of a different construction, and when no contemporaneous or subsequent acts are shown to give any other signification to them. The defendant, probably, meant by an emphatic representation of the course which

he intended to pursue, to induce the plaintiffs, and his other creditors, to compromise their claims, and to save him the necessity of making an assignment. But however strenuously he might have urged this upon their attention, it amounted to nothing more than that he was determined, if they did not compromise, to make an assignment. This was the whole substance of it; and we cannot pronounce this to be a threat to make a fraudulent disposition of his property; unless we are prepared to stigmatize that as fraudulent which the law expressly sanctions. Having arrived at this conclusion, it is unnecessary to consider the legal question submitted by the defendant's counsel.

The order appealed from should be reversed, with costs.

[New York General Term, February 1, 1858. *Davies, Clerke* and *Sutherland*, Justices.]

26 564
48 130
41a 568
47a 34

Medbury and others *vs.* The New York and Erie Rail Road Company.

When an agent is entrusted with authority, within a prescribed sphere of action, and is permitted, from day to day, without any interference on the part of the principal, to exercise the authority, third parties will not be affected by an understanding between the principal and agent, that every act of the agent shall receive the express approval of the principal.

Where the by-laws of a rail road company entrusted the general freight agent with the power of negotiating contracts for the transportation of freight, with the approval of the president; *Held* that this restriction should be construed as meaning, subject to the approval of the president, if he, on any occasion, should deem it proper to interpose, before the attempted execution or performance of the contract. But that if he did not think fit to interpose, and neglected to apprise the public that every special contract for the transportation of freight must be ratified by him, the company would be liable for the fulfillment of the contract.

Compensation for the actual loss sustained, is the fundamental principle upon which our law bases the allowance of damages. But it will not make such allowance upon a calculation of speculative profits; nor will it indemnify for remote or indirect losses.

The loss must be the natural and proximate consequence of the act; and when this can be ascertained, without uncertainty, the principle of compensation will be adopted.

In an action to recover damages for the non-performance of a contract to transport flour from one place to another, and to deliver the same at the latter place, on or before a specified day, the measure of damages is the difference between the contract price of the flour, had it arrived at the place of delivery on the day specified, and the price for which it was actually sold in the market, on its arrival.

APPEAL from a judgment for $931.39 in favor of the plaintiffs, entered upon the report of Richard Goodman, Esq. referee. The action was for damages arising from the non-performance, on the part of the defendants, of an alleged contract to transport a certain quantity of flour from Hornellsville, on their rail road, to the city of New York, and to deliver the same at the latter place, on or before the 20th day of February, 1853. The defendants denied the contract. On the trial, Horatio Stevens, a witness for the plaintiffs, testified that he, acting as their agent, made the contract with M. B. Spaulding, the general freight agent of the defendants. It was contended by the defendants that Spaulding had no authority to make such a contract. The referee adopted as the measure of damages, the difference between the contract price of the flour (had it arrived on the 20th of February) and the price it was actually sold for, in the market, on its arrival. The defendants insisted that the amount of damages could not be greater than the difference between the market value on the day it ought to have arrived, and the market value on the day when it did arrive.

A. C. Bradley, for the plaintiffs.

D. B. Eaton, for the defendants.

By the Court, CLERKE, J. It may be quite true that a common carrier is not liable on an implied contract to deliver goods at any specific time. But, like any other person,

he is bound by the terms of his express undertaking, whether entered into directly by himself, or through the intervention of an agent. The only question of which there can be the slightest doubt in this case is, whether Spaulding was authorized to make the contract upon which this action is founded. The referee has found, unhesitatingly, that he did make it; and it is not our custom to disturb any finding or verdict not clearly against the weight of evidence. As to the authority of Spaulding, he was general freight agent, beyond dispute; and the by-laws entrust him with the power of negotiating contracts and arrangements in relation to the transportation of freight, with the approval of the president. So that, if the approval of the president was given to this contract, there could be no doubt of its validity. But is a contract for the transportation of freight on an extensive rail road, where contracts of every kind in relation to freight must be almost innumerable, to fail, because the agent has neglected to present the contract to the president for his approval, or because the president has neglected, or finds it impracticable, to examine, every engagement made by his subordinates, throughout the whole extent of the road? Necessity requires, and the protection of all persons transacting business with a concern of this description requires, that this restriction relative to the approval of the president, should be construed as meaning, subject to his approval, if he, on any occasion, deems it proper to interpose, before the attempted execution or performance of the contract. But, if he does not think proper to interpose, and neglects to apprise the public that every special contract for the transportation of freight must be ratified by him, the company must be then held liable for the fulfillment of the contract. When the agent is entrusted with authority within a prescribed sphere of action, and is permitted, from day to day, without any interference on the part of the principal, to exercise the authority, I do not think that third parties should be affected by an understanding between the principal and agent, that every act to receive

the express approval of the principal. But it may be fairly doubted whether any such restriction was intended in the by-laws. Taking into consideration the multiplicity and variety of business on this rail road, it may be well supposed, as I have already intimated, that the restriction meant that the contracts of the superintendent should be subject to the approval of the president, whenever he should deem it prudent to interfere. This view is strengthened by the direction in section 16 of the by-laws, that the chief clerk shall be furnished, by the general freight agent, with copies of all special contracts for transportation of freight. If it was intended that in every instance the contract should receive the express ratification of the president, it is not probable, if in writing, that it would remain in the possession of the agent, but the proper person to transfer it to the chief clerk, would be the president himself, after affixing his consent to it.

We consider the exceptions on the other points equally untenable. The referee adopted the correct rule of damages in cases of this nature. Compensation for the actual loss sustained, is the fundamental principle upon which our law bases the allowance of damages. It will not, indeed, make this allowance upon a calculation of speculative profits; for this would be proceeding upon contingencies, and would involve the subject too much in uncertainty. It would be too difficult for practical application. Nor will the law indemnify for remote or indirect losses. The loss must be the natural and proximate consequence of the act, and when this can be ascertained without uncertainty, the principle of compensation will be adopted. This was clearly ascertainable in the present case.

The judgment should be affirmed, with costs.

[New York General Term, February 1, 1858. *Davies, Clerke* and *Sutherland*, Justices.]

26 568
30 423
116a 292

C. A. & A. D. Morford *vs.* The Farmers' Bank of Saratoga County.

A banking or other corporation is not authorized to make an accommodation indorsement; and the same is not binding, unless it appears that the note has been discounted in good faith by the party suing thereon, in consequence of a representation made by the bank that it was its own note.

APPEAL from a judgment entered in favor of the defendants, a corporation incorporated under the general bank ing law, upon the report of H. W Robinson, Esq., referee. The action was upon a promissory note for $2500, made by the Chicago, St. Paul and Fon du Lac Rail Road Company, dated January 9th, 1857, and payable 180 days after date, to the order of the defendants, who, as the complaint alleges, indorsed the same by their president, Alfred Noxon, to the said Alfred Noxon, who indorsed and delivered the same to the plaintiffs. The indorsements were as follows:

A. Noxon Prest.
A. Noxon.

The referee was of the opinion that the case was within the prohibition of the 4th section of the amendment to the general banking law, passed in 1840, *Laws of* 1840, *ch.* 363, *p.* 306,) against any banking association issuing any bill or note of the association, (except foreign bills,) unless the same shall be payable on demand and without interest. A bill or note issued by a banking association, is in the opinion of the referee, equally the bill or note of the association, whether it appears thereon as drawer, acceptor or indorser, and that the prohibition extends to the issuing by the association of a bill or note not payable on demand, or with interest, *to which it is a party.*

Monell, *Willard* and *Howe*, for the plaintiffs.

J. C. Mott, for the defendants.

By the Court, Clerke, J. Although the referee erred in deciding that this case is within the prohibition of the 4th

section of the amendments to the general banking law, passed in 1840, yet he is right in the main propositions upon which his decision is founded. He correctly finds, that the defendants never owned the note and never had any interest in it; that Mr. Noxon, the president, was never authorized to indorse it in the name of the bank, for the accommodation of the makers, and that he had not any general authority to contract in their name. Even if Noxon was authorized to make the indorsement, yet as the bank never owned the note, and had no interest in it, it would have been a mere accommodation indorsement on their part; which no banking or other corporation is authorized to make; and which is not binding, unless it appears that the plaintiffs discounted it in good faith, in consequence of a representation made by the bank to them, that it was their note. In this case the referee finds as a matter of fact that Mr. Noxon himself, in his own right, appeared as indorser and holder, and solicited the discount for himself.

The judgment should be affirmed with costs.

[New York General Term, February 1, 1858. *Davies*, *Clerke* and *Sutherland*, Justices.]

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26 569
31a 641
78a 354
102a 558

Voorhees and Talcott *vs.* Seymour, President of the Bank of Auburn.

A judgment creditor, by commencing supplementary proceedings against the judgment debtor under section 292 of the code, and obtaining an order for the examination of the debtor, does not acquire a prior right to, or lien upon, the equitable assets of the debtor. Pratt, J. dissented.

If, after the granting of such an order, another creditor commences a suit against the judgment debtor, to enforce an equitable lien upon the equitable assets of the debtor, by way of pledge, which suit results in a judgment establishing the lien claimed, and directing a sale of the assets for the payment of the claim, the latter suit is conclusive against the right of the creditor instituting the supplementary proceedings, and establishes, incontrovertibly, the claim of the plaintiff in the last suit, to the equitable assets

of the judgment debtor; and the judgment cannot be impeached collaterally in an action brought by the creditor instituting the supplementary proceedings, and the receiver appointed therein.

APPEAL, by the plaintiffs, from a judgment entered upon the report of a referee. The action was brought by the plaintiff Voorhees as assignee of several judgments against George F. Leitch, and by Richard Talcott, receiver of the property and effects of the said Leitch, appointed in proceedings supplementary to execution, commenced by the said Voorhees. The object of the action was to reach certain bank stock formerly owned by the said Leitch, or the proceeds thereof, upon which it was claimed the plaintiff Voorhees had obtained a lien by virtue of the said supplementary proceedings, and the order made therein for the examination of the judgment debtor, which stock had been claimed and received by the defendant, the bank of Auburn, without right, and appropriated to its own use. The plaintiffs, in their complaint, claimed that the defendant should be brought to account concerning the said stock, and the proceeds and dividends thereof; and demanded judgment, that the same be applied in payment of the plaintiff's judgments, &c. and for other and further relief. The referee held and decided that the judgments in favor of The Auburn Theological Seminary, and The Bank of Auburn, under which the defendant claimed the stock, and the proceeds thereof, were conclusive in this action upon the rights and claims of the parties, and established, as against the plaintiff, the claim and lien of the defendants upon the stock and its proceeds, to the amount of the debt adjudicated—which exceeded in amount the value of the stock owned by the debtor Leitch; and that the defendant was entitled to judgment, dismissing the complaint of the plaintiff, with costs. The facts are more fully stated in the opinion of the court.

J. L. Newcomb, for the appellants. I. *Proceedings, supplementary to execution*, having been commenced upon some

of the judgments on which this action is founded—before either the *seminary* or *bank* suits were commenced—such judgments became a *lien* upon the bank stock in question, and the owners of the judgments acquired such a *prior* right to the stock, by their diligence, that such lien and prior right could not be cut off and destroyed, and the object of such proceedings defeated by subsequent suits, to which they were not made parties, and of which they had no notice. (1.) Where proceedings, supplementary to execution are instituted under the code, the order for the debtor's examination, under the 292d section, gives the judgment creditor the same lien upon the debtor's equitable assets which he acquired under the former practice, by the commencement of a suit by a creditor's bill. (*Porter* v. *Williams*, 5 *How. Pr. Rep.* 441, *Harris, J. Sale* v. *Lawson*, 4 *Sandf. S. C. R.* 718; *see opinion. Orr's case*, 2 *Abbott's Pr. R.* 458. *Griffin* v. *Dominguez*, 2 *Duer*, 658. *Myres' case*, 2 *Abbott*, 476; *see opinion. Lilliendahl* v. *Felleman*, 11 *How.* 529.) (2.) Under the former practice, the judgment creditor who first filed a creditor's bill obtained thereby a priority over all other creditors, in relation to the debtor's equitable assets. (1 *Barb. Ch. Pr.* 158. *Corning* v. *White*, 2 *Paige*, 567. *Albany City Bank* v. *Schermerhorn*, 1 *Clarke*, 297.) (3.) It would be a gross violation of all just and equitable principles, to establish the doctrine, that while a judgment creditor is proceeding diligently, by supplementary proceedings, to save his debt, another creditor, who has no judgment, and who obtains knowledge of the first proceeding, by being called as a witness therein, may subsequently commence a suit against the debtor, without the knowledge of the judgment creditor, and through the debtor's default, obtain a judgment, establishing a pretended lien upon the identical property that the judgment creditor is in pursuit of, and thereby forever conclude the judgment creditor from litigating the question of the right and title to the property.

II. In order to estop, or conclude, the plaintiffs by the records in the bank and seminary suits, introduced by the de-

fendant—or to entitle the defendant to put them in evidence—the plaintiffs in the judgments on which this action is founded, and the receiver, should have been made parties to those actions. (1.) The defendant, Seymour, by being sworn and examined as a witness in the supplementary proceedings mentioned in the report of the referee, had notice, and the bank, thereby, also had notice, not only of the existence of the judgments against Leitch, and the names of the judgment creditors, but also of the fact that proceedings were pending for the appointment of a *receiver*, before the commencement of either the seminary or bank suits; and such notice was sufficient to put the bank upon inquiry as to whether a receiver was appointed; and the bank was bound to have made the receiver a party to the suits, as soon as he became such receiver, without special notice that he had been appointed. (2.) The bank was bound to have made the receiver a party to the bank suit, as soon as Jewett served a notice on Seymour of the appointment of the receiver, in order to conclude the receiver. (3.) The receiver had been appointed, and Jewett had served on Seymour notice of such appointment, before any complaint had been filed or served in the bank suit, and before there was any paper in existence, showing the object of the action. Nothing had then been done but the service of a summons on Leitch; and, if the bank had not intended to prevent a fair litigation of the question, the summons would then have been amended, and the receiver made a party to the suit. (4.) From the time the appointment of the receiver became perfected—by force of such appointment (and before any complaint had been filed or served in the bank suit)—the receiver became vested with the bank stock in question, and all other personal property of Leitch. (*Porter* v. *Williams & Clark*, 5 *Selden*, 142. *Wilson* v. *Allen*, 6 *Barb.* 542. *West* v. *Fraser*, 5 *Sandf.* 6 3.)

III. Not only were not the plaintiffs in this action—the plaintiffs in the judgments, upon which the action is founded—the owners thereof, nor any of them, *parties* to either the

bank or *seminary* suits, but the plaintiffs in this action are not, nor are either of them, *privies* thereto, within the meaning of the rule by which an adjudication concludes both *parties* and *privies*. (1.) The exceptions to the general rule are very numerous; and, indeed, the rule seems to have been relaxed, whenever there was the slightest change in the relation or character of the parties, or when the circumstances of the particular case seemed to require it, in order to do justice between the parties, viz: "A judgment is not to be used as an estoppel against a party who does not stand in the same relation or character as in the former suit." (1 *Phil. Ev.* 323.) "A verdict for the defendant, in a suit by the payee of a note, in his own right, will form no bar to a suit brought in the name of the payee, for the use of the true owner." (4 *Yerg.* 4.) "A party suing as *executor*, in an action of debt upon a bond, will not be estopped by having been barred in an action upon the same bond, where he sued as *administrator*." (1 *Phil. Ev.* 323.) There is no *privity* between an executor or administrator, and the heir or devisee of the deceased; and a judgment against the former is not evidence in an action against the latter to charge the real estate. (*Mason's Devisees* v. *Peters' Adm'rs*, 1 *Munf.* 437. 1 *Stark. Ev.* 257, *n.* 1.) Where the same party sues, or is sued, in a different capacity and in a different right, he will not be concluded by the former record. Thus, if a party sue, as *administrator*, and fail, he will not be estopped from maintaining an action against the same defendant, as *executor;* so, if one claim as heir to his father, he will not be estopped from afterwards claiming as heir to his mother." (*Stark. Ev.* 264.) (2.) In the bank suit, the cause was never at issue; it was never tried; but one side of the question has ever been heard; and, for aught that appears, there was collusion between the bank and Leitch. The bank took precisely such a judgment as it pleased, and there was no one to question it; yet the bank seeks, now, to stifle *all* investigation, and protects itself by the record! The policy of the law is, that every cause be once fairly and im-

partially tried; and no technical rule should be strained by the court to screen the defendant, and prevent a full and fair trial of the question to whom rightfully belongs this large amount of property, (3.) The supplementary proceedings, on the part of the judgment creditors, for the appointment of the receiver, and indeed *all* the proceedings on the part of the plaintiffs, have been *hostile* to Leitch. (4.) The receiver has a twofold relationship; the property of the debtor is vested in him, and he also represents the *creditors:* and, as the representative of creditors, may maintain an action to annul the acts of the debtor which are prejudicial to creditors. (*Porter* v. *Williams*, 5 *Seld.* 142, 149. *Wilson* v. *Allen*, 6 *Barb.* 542. 3 *Comst.* 479, 488.) (5.) A receiver is an officer of the court; and is considered properly the hand of the court. And his position is far more important than that of a mere representative of the debtor. (1 *Barb. Ch. Pr.* 658. *Booth* v. *Clark*, 17 *How. U. S. R.* 322, 331.)

Geo. Underwood and *A. J. Parker*, for the respondents. In the suit by the Theological Seminary the summons was served on Leitch on 22d July, 1850. In the suit by the bank, on 3d August, 1850. The order appointing Talcott receiver was made on 6th September, 1850, and he did not file his bond until 19th September, 1850. I. The judgments recovered in these cases were conclusive upon the parties and their privies, in all collateral proceedings. (*Embury* v. *Conner*, 3 *Comst.* 511, *and cases there cited.* 3 *Term Rep.* 301. 2 *Cow. & Hill's Notes*, 804 *to* 812, 971. *Phil. Ev.* 324, 380. *Preston* v. *Harvey*, 2 *Hen. & Mun.* 55. *Greenl. Ev.* §§ 522, 523. *Candee* v. *Lord*, 2 *Comst.* 275. *Rogers* v. *Haines*, 3 *Greenl.* 362. *Adams* v. *Barnes*, 17 *Mass. Rep.* 365.) (1.) Leitch and Talcott were "privies in estate," if the latter took by assignment—and privies in law if the latter took under the order appointing him receiver; and the latter having taken his title after the former had been sued as a party, is bound by the proceeding. (2.) "The term 'privity' denotes

mutual or successive relationship to the same rights of property." (*Greenl. Ev.* § 189.) The plaintiffs are in privity with Leitch, because they make their claim through him. (3.) A record in one suit cannot be read in evidence in another unless both parties, *or those under whom they claim*, were parties to both suits: it being a rule that a record cannot be used against a party who could not avail himself of it, in case it made in his favor. (*Dale* v. *Roosevelt*, 1 *Paige*, 36.) In this case, if judgment had been rendered against the seminary and the bank, in the suits brought by them against Leitch, &c. there is no doubt Talcott, the receiver, might show it and avail himself of such judgments, in this suit, or in a new suit brought by the bank. (4.) To whose rights did Talcott succeed when he became receiver? Either to those of Leitch alone, or at most, of Leitch and his creditors. As the representative of Leitch, he was of course bound by the previous service of process on Leitch. As a representative of the creditors, he stood in the place of those never entitled to be made parties. (*Porter* v. *Williams*, 5 *Seld. R.* 142.) (5.) If it be said the plaintiff should have made Talcott a party after he succeeded to the interests of Leitch, the answer is—*First.* That the plaintiff had no knowledge of such appointment till after the judgment was entered. *Second.* It was unnecessary, and the suit was properly carried on in the name of Leitch as defendant. It is only in case of *death*, *marriage*, or other *disability*, that the plaintiff may get the suit continued against the personal representatives, on motion, or by supplemental complaint. (*Code*, § 121.) In case of *any other transfer of interest*, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in this action. This means, of course, on the application of such person. (*Code*, § 121.) Before the code, an adjudication was binding not only on the defendant but on all who came in under him *pendente lite*. (*Kershaw* v. *Thompson*, 4 *John.*

Ch. R. 609. *See form of decree of foreclosure,* 2 ***Barb.*** *Ch. Pr.* 614.)

II. But there is a still stronger reason why the judgments recovered by the seminary and the bank are conclusive upon Talcott. They were both proceedings *in rem*—proceedings to enforce a specific lien, and decisions *in rem* are binding and conclusive not only upon the parties actually litigating the cause and their privies, but upon all others, if the suit was commenced against the proper parties, and if the judgment was obtained *bona fide* and without fraud. *Greenl. Ev.* §§ 525, 540, 541, 542, 544, 555. 1 *Stark. Ev.* 546, 547.) Proceedings *in rem* are conclusive on all the world. (*By Ruggles, J. in Wadsworth* v. *Sharpsteen,* 4 *Seld. R.* 392.) (1.) A bill to foreclose is a proceeding *in rem* until the premises are exhausted. It is only a proceeding *in personam* where a decree is claimed for a deficiency and as to that part of the claim. (*Johnson* v. *Fitzhugh,* 3 *Barb. Ch.* 360. *Kershaw* v. *Thompson,* 4 *John. Ch.* 613.) (2.) The adjudication on the lien, being the proceeding *in rem* is all that is in question in this case. Talcott, the receiver, has no interest in the question whether the bank had a judgment for the deficiency. (3.) In a proceeding *in rem* any person having an interest may make himself a party by applying to the proper tribunal before which such proceeding is had; and who will therefore be bound by the sentence or decree of such tribunal although he is not in fact a party. (*Bogardus* v. *Clarke,* 4 *Paige,* 626. *Scott* v. *Sherman,* 2 *Wm. Black. Rep.* 977. *Hart* v. *McNamara,* 4 *Price,* 154, *n.*)

III. No *fraud* or *collusion* is alleged in the complaint, and of course the proceedings cannot be impeached in this action. The plaintiffs only ask for an account, and the judgments by virtue of which the bank held the money are the account and settlement thereof by the court. (2 *Comst.* 275.)

IV. It appears by the pleadings and judgments that both in the suit by the seminary and in the bank suit, the process was served not only on Leitch, but also on Moses & Ostrand-

er, the general assignees of Leitch, and that Moses & Ostrander appeared in both actions They being the general assignees, *prima facie* no interest vested in Talcott, as receiver.

V. There is a misjoinder in the parties plaintiffs. No joint cause of action was established in the two, and they cannot unite in the action.

VI. As to Voorhees, an alleged judgment creditor, he would in no case be entitled to be made a party defendant in a suit to foreclose a lien by the bank, and as to him, therefore, the records of judgment were conclusive. (2 *Comst.* 275.)

VII. The supplementary proceedings commenced 30th April, 1850, created no lien on Leitch's property. The title vests only in the receiver when his appointment is perfected. (*Porter* v. *Williams*, 5 *Seld.* 142.) The doctrine of *lis pendens* in case of a creditor's bill filed, is not applicable to an order for examination of a defendant in supplementary proceedings—here no papers are *filed* and there can be no *constructive* notice to other persons. (1 *Paige*, 637, 640. 3 *Atk. R.* 357. 2 *Paige*, 567.)

VIII. Before these supplementary proceedings were commenced, the whole interest of Leitch had passed by assignment to Moses & Ostrander, and all their acts are protected. (4 *Paige*, 24.)

IX. Even if a lien was vested in the creditor on commencing supplementary proceedings, it is not available in this action. Because, 1. The bank had no notice of such proceedings. 2. The bank suit was *in rem* and bound others as well as parties and privies. 3. It was at most but an inchoate equitable lien, and not such a lien as made it necessary to make a mere creditor a party. 4. *No such lien is alleged in the complaint*, but the claim made is that Leitch was the absolute owner till Talcott was appointed receiver. 5. Suppose a general creditor's bill had been filed, instead of the supplementary proceedings. It would not affect an assignee in possession not made a party. (1 *Paige*, 637.) It would not affect a

pledgee in possession, like the bank. Its object would be to reach the interest in the surplus after the pledgee was satisfied. A general creditor's bill would reach no more. If a bill was filed to contest the alleged lien of the pledgee, it would be special, and the pledgee would be a necessary party. The only priority a creditor's bill ever obtained was over other creditors' bills and over a subsequent purchaser from the debtor who was supposed to have had notice by the filing of the creditor's bill.

X. The examination of Mr. Seymour on 26th June, 1856, was clearly no notice to the bank, even if notice were available. The object of that examination was to get information from Mr. Seymour, not to give it to him. He had no knowledge of the nature or object of the proceedings. In testifying, Mr. Seymour acted personally and not officially, and even knowledge acquired under such circumstances would not affect the bank. (*National Bank* v. *Norton*, 1 *Hill*, 572, 579.) Notice to a director, *when not engaged in the business of the bank*, is not notice to the bank. (*Ang. & Ames on Corp.* 247, 248, *and cases there cited.*)

By the Court, Bacon, J. The plaintiff Voorhees, before the commencement of this suit, became the owner by assignment to him of a large number of judgments recovered against George F. Leitch, amounting in the aggregate to nearly the sum of $40,000. Among these were two judgments, one in favor of Obadiah Thorne, and one in favor of Elias Thorne recovered on the 28th of February, 1850, upon which executions had been duly issued and returned unsatisfied. Upon the return of these executions and on an application pursuant to the 292d section of the code, an order was granted, on the 30th of April, 1850, for the examination of the judgment debtor Leitch; and the examination having been had before a referee, upon his report an order was made by the justice before whom the original proceeding was taken, appointing Talcott, the co-plaintiff, receiver of the property of Leitch.

This order was made on the 6th of September, 1850, but the security required on entering into the receivership was not approved until the 10th, and was not filed until the 19th of September, 1850. Prior to the recovery of any of the judgments now held by the plaintiff Voorhees, Leitch was the owner of 1352 shares of the stock of the Bank of Auburn, of which 388 were pledged to the Auburn Theological Seminary, to secure a debt owing to the institution by Leitch; 366 to Henry Mills for a similar purpose, and upon the balance, the Bank of Auburn claimed to hold a lien by way of pledge to them for a large indebtedness of Leitch to the bank. In July, 1850 the Theological Seminary commenced a suit against Leitch and various other parties, including the Bank of Auburn, the result of which suit established their claim; the stock pledged to them was sold, and a surplus arising from the sale was paid over to the bank, to apply on their indebtedness. Subsequently to this, and in the month of August, 1850, the Bank of Auburn commenced a suit to assert their lien on the shares of stock claimed to have been pledged to them, in which suit Leitch and his general assignees were made parties with other defendants. That suit was not defended by either Leitch or his assignees, and resulted in a judgment establishing the lien of the bank as claimed, and the stock, pursuant to the decree, was subsequently sold, and the proceeds passed into the hands of the bank, and were applied upon their indebtedness, leaving a large balance still due; for which deficiency judgment has been duly docketed against Leitch.

The ground upon which the plaintiffs claim to hold the stock, and assert a right thereto paramount to that set up by the defendants by virtue of the judgments which established their claims, is, that by commencing the supplementary proceedings, and obtaining the order for the examination of the judgment debtor, before either the seminary or the bank suits had been instituted, Voorhees, the owner of the judgments against Leitch, acquired a prior right to the stock, which

could not be defeated by the subsequent suits to which neither he nor the receiver were made parties. It is insisted that under the code, the simple order for an examination under the 292d section gives the judgment creditor the same lien upon the debtor's equitable assets that was acquired by virtue of a creditor's bill under the former chancery practice. The rule under the old system was well settled, that a creditor who had an execution returned unsatisfied would, by filing a bill and serving process upon the party, obtain a specific lien upon the equitable assets of his debtor. (*Edmeston* v. *Lyde*, 1 *Paige*, 637.) And the creditor who first filed his bill and commenced his suit, obtained a priority over other creditors, who had only exhausted the legal remedy by the issuing and returning of executions unsatisfied. (*Corning* v. *White*, 2 *Paige*, 567.) The doctrine proceeded upon the ground of constructive notice by virtue of an actual *lis pendens*, and this effect was given to the suit as the reward of superior diligence on the part of the creditor who initiated the proceedings. Can so broad an effect be given to the order for examination of the debtor under the code? An order, it must be remembered, which is obtained *ex parte* at chambers, without notice, and which may never, in any stage of the proceeding, become a matter of record. It must be conceded that neither in the section itself, nor in any other part of the code, is any such effect imparted to the order, and I find no case since the code that purports to establish or impliedly recognizes this doctrine, excepting the case of *Porter* v. *Williams*, (5 *How.* 441.) This appears to have been a special term decision by Judge Harris. In the course of his decision, the judge says, "The code is silent as to the time when the judgment creditor shall be deemed to have acquired a lien upon his debtor's equitable effects, *but I think* the order for his examination made under the 292d section, should be construed to give the creditor the same lien which he acquired under the former practice by the commencement of a suit by creditor's bill."

If this had been a carefully considered and deliberate opin-

ion, and the point had necessarily arisen in the determination of the case, my habitual respect for the opinions of the learned justice would induce me to receive it without much doubt or question. In truth, however, it amounts to but little more than a suggestion of what the rule might be, and was not necessarily involved in the decision of the cause. The real and vital point in the case of *Porter* v. *Williams* was whether it was necessary in order to vest the title to the property of the judgment debtor in the receiver, that the debtor should execute a formal assignment, or whether he took this title and was invested with the interest by force of the appointment itself of receiver. This was all that it was necessary to decide to uphold the right of the plaintiff in that case to set aside a fraudulent assignment theretofore made by the judgment debtor, and this point was very clearly ruled by Judge Harris. The case went to the court of appeals, and the decision was there upheld upon this precise point; the court affirming the doctrine maintained by Judge Harris, that the order appointing the receiver had the effect, without an assignment by the debtor, to divest his title and to vest it in the receiver. (*See* 5 *Seld.* 142.) Other questions were discussed and decided in that case as to the extent of the title to property acquired by the receiver, but they have no reference to the point we are now considering. It will be seen on reading the opinion of the court that the proposition suggested by Judge Harris as to the effect of the order for the examination of the debtor, was not passed upon in the court of appeals, as indeed it was not necessarily involved in the case. But the court do say that before the code, it was settled "that the order appointing a receiver, *when the appointment was completed*, vested in him all the property and effects of the debtor, subject to the order, without an assignment." This is in accordance with the decision in *Mann* v. *Pentz*, (2 *Sand. Ch. Rep.* 257,) and in *Wilson* v. *Allen*, (6 *Barb.* 542.) The implication from these decisions is very strong, if, indeed, the conclusion is not irresistible, that until

the order for a receivership is made, and the appointment perfected, no interest whatever of the debtor passes to the receiver, and no title to any thing whatever is acquired by him. It would be giving the naked order for an examination a very far reaching effect to hold that all the equitable assets of the debtor passed out of him *eo instanti* the order for his examination was made, and although there were no other party in existence that could take, they were to be held in abeyance until perchance, at some time thereafter, a receiver should be appointed in whom the title could vest.

It may be, indeed, that as between two or more creditors who are upon the chase—"*pedibus manibusque*"—after the equitable assets of their debtor, the one who procures the first order may acquire a sort of inchoate lien entitling him to an ultimate preference, provided he pursues his remedy diligently, and consummates the proceeding by an order for a receivership, and an appointment following thereon. But even in such a case, if the creditor obtaining the first order quietly folds his hands, and takes no farther step, but permits a second order to be obtained, an examination to be had, and a receiver appointed and qualified, I should seriously question whether the latter would not override the first order, and the creditor obtaining it entitle himself to a preference not only on the ground of his superior diligence, but in accordance with the principle that it was the order for the receivership, completed by the appointment, that drew after it the title to the equitable assets and made them enure to the benefit of the party who procured the order, and perfected the appointment. This would be in harmony with the doctrine of the court of chancery, which gave the preference to the creditor whose execution was first returned, provided he followed it up by a creditor's bill, and the steps consequent thereon. "But," as the chancellor says in *Edmeston* v. *Lyde*, "if he abandons the pursuit, or lingers on the way, before he has obtained a specific lien, he has no right to complain if another creditor obtains a preference by superior vigilance." The time honored max-

im holds good here as elsewhere, "*Vigilantibus, non dormientibus leges subveniunt.*"

It results from this conclusion, that when the Bank of Auburn commenced their suit against Leitch and others in August, 1850, the title to the stock, or the resulting equitable interest in it, still remained in him; or had passed to his general assignees, and they, together with Leitch, were made parties to the suit. It needs the citation of no authority to show that a judgment between these parties, in regard to the subject matter of that suit, was entirely conclusive upon them when sought to be again called in question, either directly or incidentally, before any other forum. But it not only concludes the parties themselves, but is equally binding upon all who stand in the relation of privies to them. For, as Greenleaf states the proposition, (1 *Greenl. Ev.* § 523,) "to give full effect to the principle by which parties are bound by a judgment, all persons who are represented by the parties, and *claim under them*, or in privity with them, are equally concluded by the same proceedings." The extent of this rule is comprehensively stated by Spencer, J., in *Case* v. *Reeve*, (14 *John.* 81.) "A verdict or judgment in one action upon the same matter, directly in question, is evidence for or against privies in blood, privies in estate, such as feoffee, lessee, &c., and privies in law, as tenant by curtesy, &c. and others who came in by act of law in the *post.*"

It is very clear that the general creditors of Leitch were in no respect entitled to be made parties to that suit, and of consequence Voorhees, as the assignee of the judgments, was not a necessary party.

Talcott, the receiver, succeeded to the rights of Leitch alone, or to those of Leitch and his creditors, and he so succeeded to those rights on the 19th of September, 1850. If Leitch had then made an actual assignment to Talcott, the latter would have been a privy in estate; if he succeeded to the rights of Leitch, by the order appointing him receiver, he became a privy in law, and in either case his title accrued

after the suit had been commenced against Leitch, and consequently as being in privity with him he was bound by the proceeding, for privity means mutual or successive relationship to the same right of property. (*Greenl. Ev.* § 129.)

But it is claimed that when the Bank of Auburn was apprised of the existence of the receivership, Talcott should at once have been made a party, and that unless so brought in, he could not be concluded by the judgment in that suit. The answer to this is, that the bank had no notice of his position, until the 16th of November, long after the suit had been commenced; for it can hardly be pretended that the bank was chargeable with such notice, from the mere fact that Seymour, the cashier, had been examined before the referee, under the order for the examination of the judgment debtor. He was not acting, on this occasion, as the representative or agent of the bank, and any information he may have thus gained was notice of no fact by which the bank could be bound. The acts of a director or other officer of a corporation, unless official, or in respect to his agency, are no more operative against the corporation than the acts of any ordinary corporator. (*National Bank* v. *Norton*, 1 *Hill*, 579.) But there is no principle of law which required the plaintiffs to bring in any party who had succeeded to the rights of a defendant *pendente lite*. In case of death, marriage, or other disability, the plaintiff may have the suit continued against the personal representative or successor in interest, by motion, or supplemental complaint, but the code expressly provides that in case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action. (*Code*, § 121.) The receiver, on making such application, would doubtless have been allowed to come in as a defendant in the suit, but the plaintiff was under no obligation to move on his behalf, and standing in the position that the receiver did to Leitch, the proper party on the record,

he was bound by the adjudication in relation to the subject matter of the suit.

This result, it seems to me, necessarily follows from such a judgment, whether rendered upon default, confession, or after contestation; and it can in no way be impeached, except upon an allegation that it was obtained in bad faith, or by collusion between the parties. This principle is well and strongly stated by Gardiner, J., in *Candee* v. *Lord*, (2 *Comst.* 275.) "In establishing the relation of debtor and creditor, the debtor is accountable to no one unless he acts *mala fide*. A judgment, therefore, obtained against the latter without collusion is conclusive evidence of the relation of debtor and creditor, against others; first, because it is conclusive between the parties to the record, who in the given case have the exclusive right to establish it; and second, because the claims of other creditors upon the debtor's property are through him, and subject to all previous liens, preferences or conveyances made by him in good faith. Any deed, judgment, or assurance of the debtor, so far, at least, as they conclude him, must estop his creditors, and all others." In this case no fraud or collusion whatever is alleged in the complaint, and the plaintiffs have not put themselves in any position to challenge the judgment upon this ground.

Without discussing the other point urged on the part of the defendant—that the proceeding of the Bank of Auburn to enforce the specific lien claimed, upon the stock, was a proceeding *in rem*, and was therefore conclusive, not only upon the parties litigating the cause, but upon all other parties whatever, no matter what position they occupied—I think the referee properly held that the actions prosecuted by the Theological Seminary and by the Bank of Auburn, were conclusive against the right of action asserted by the plaintiffs, and established, incontrovertibly, the claim of the defendant in this suit to the stock, and the avails thereof, and

that the judgments could not be collaterally impeached in this suit.

The judgment rendered upon the report of the referee must consequently be affirmed.

PRATT, J., dissented.

Judgment affirmed.

[ONONDAGA GENERAL TERM, October 6, 1857. *Wm. F. Allen, Bacon, Pratt* and *Hubbard*, Justices.]

26 586
39 101
25a 588

ROBBINS *vs.* GORHAM.

Where a person, duly summoned and returned as a juror, for the trial of an action pending before a justice of the peace, fails to appear at the trial, the justice may, after the termination of the trial, issue a summons directed to such person, requiring him to appear and show cause why he should not be fined, for his non-attendance as a juror. And if, upon personal service of such summons, such juror fails to appear on the day appointed, the justice may issue an attachment against him; and upon his being brought before the justice and failing to show any excuse for his conduct, such juror may be fined, by the justice.

And upon drawing up and subscribing a record of such conviction, the justice may issue an execution for the collection of the fine imposed, out of the property of the person thus proceeded against.

The proceedings of the justice, on hearing the case and imposing the fine, are judicial, and cannot be overhauled in an action against him, but are subject to review only by further proceedings in the same matter.

It is no objection to the validity of the conviction, in such a case, that the justice did not enter in his docket a minute thereof. The statute requiring such an entry to be made (2 *R. S.* 241, § 87) is merely directory.

APPEAL from a judgment of the Chautauque county court, affirming the judgment of a justice's court. The appellant, Gorham, was a justice of the peace of the town of Pomfret, Chautauque county. An action of which he had jurisdiction was pending before him as such justice, on the 6th July, 1855, and came on for trial on that day. On demand of the parties the justice issued a venire, and amongst others Robbins, the

respondent, was duly summoned and returned as one of the jurors. He did not appear on the jury being called nor at any time during the trial of the cause. The trial of the cause commenced on the 6th of July, and was continued to and closed on the 7th. On the 9th day of July the appellant issued a summons requiring Robbins to appear and show cause on the 11th, why he should not be fined for his non-attendance as a juror in said action. This summons was personally served on the 10th by a constable, who made due return of such service. Robbins failed to appear on the 11th, pursuant to such summons, and thereupon the justice issued an attachment against him, on which he was attached by a constable and brought before the justice on the 13th of July, and failing to show any excuse for his non-attendance as a juror, he was fined $10, and $2 costs of the proceedings. The justice prepared a record of his proceedings and of the conviction, reciting the various steps, &c. and subscribed the same at the time of imposing the fine; but did not actually copy or enter the conviction in his docket. He also issued to a constable an execution, reciting the proceedings and conviction, &c. and directing the collection of said fine and costs; by virtue of which the officer levied and sold property of Robbins, and this action was brought and a recovery had against the justice for such levy and sale.

The county court affirmed the judgment of the court below.

E. Ward, for the appellant.

Geo. Barker, for the respondent.

By the Court, DAVIS, P. J. The objection that the justice did not "enter in his docket a minute of the conviction," as directed by statute, (2 *R. S.* 241, § 87,) is fully disposed of by the cases cited by the appellant's counsel. There is no essential difference between the language of this section and of that directing the entry of other judgments of justices of

the peace; and the decisions both of this court and of the court of appeals settle that it is to be regarded as merely directory. (*Hall* v. *Tuttle*, 6 *Hill*, 38. *Walrod* v. *Shuler*, 2 *Comst.* 134.)

It is to be regretted that the legislature has not more distinctly defined the powers of justices of the peace in punishing defaulting jurors, and particularly the mode by which they are to be brought before the court in case of their refusal or neglect to appear, in obedience to the venire. The efficacy of these courts has been greatly impaired by the doubts entertained as to the extent of their powers to compel the attendance of jurors to answer for their default, and as to the manner in which the power apparently conferred is to be exercised. To such an extent has this gone, that in many localities it is nearly impracticable to secure the benefit of a jury trial in a justice's court, at least in the spirit in which it was intended to be given by the statute. The justice of the peace who in good faith has attempted to vindicate the dignity of his court by securing obedience to its process, is certainly deserving of commendation, even should it appear that he has unwittingly transcended his powers and thus subjected himself to the annoyance of an action.

The power to issue a venire to summon jurors is distinctly given to justices of the peace by statute, or rather the duty to issue the process, when properly demanded, is imperatively imposed. (2 *R. S.* 242, § 94.)

The return of the officer that he has summoned the jurors is *prima facie*, and if not traversed conclusive, evidence of the service of the writ. It is quite sufficient for the justice to act upon in taking subsequent proceedings to punish the defaulting juror. (14 *John.* 482. 11 *East*, 297. 4 *Burr.* 2129.) The juror thus summoned who neglects or refuses to appear is guilty of a contempt of court; and if there were no way to punish that contempt, the power conferred on the court to summon him is a useless and idle mockery. Were the statute entirely silent as to the authority of the court to enforce obe-

dience to its venire, there would be little difficulty in holding that such authority was a necessary incident. But the power to punish such disobedience is expressly conferred, and the only difficulty is in determining at what time, and in what manner, it may be exercised.

By section 112, 2 *R. S.* 245, it is enacted that "Every person who shall be duly summoned as a juror, who shall not appear nor render a reasonable excuse for his default, or appearing shall refuse to serve, shall be subject to the same fine, to be prosecuted for and collected with costs in the same manner and applied to the same use, as hereinbefore provided, in respect to a person subpœnaed as a witness and not appearing, or appearing and refusing to testify." By referring to section 85 of the same chapter, (2 *R. S.* 241,) we find it enacted that every person duly subpœnaed as a witness, who shall not appear, or, appearing shall refuse to testify, shall forfeit for the use of the poor of the town, (unless some reasonable cause or excuse shall be shown on his oath or the oath of some other person,) such fine not less than sixty-two cents nor more than ten dollars, as the justice before whom prosecution shall be had shall think reasonable to impose." This section declares the extent of the *fine* that may be imposed, without directing the steps to be taken to determine whether the witness or juror is guilty of the contempt subjecting him to the penalty.

It is supposed and claimed by the respondent in this case, that the 83d section provides the only mode in which a defaulting witness or juror may be brought into court: but a careful examination of that section will show that its only object was to secure the testimony of the witness in the pending trial, by attaching and bringing him in for the purpose of being examined *as such*, and that it is wholly inapplicable to the case of a defaulting juror. The affidavit upon which, alone, that attachment can issue, could certainly not be made as against a non-attending juror: and although the justice doubtless might, by force of the 86th section, proceed to fine the witness who had been brought in by attachment under the

83d section, yet it would not be because of his having been attached, but because of his being present "and having an opportunity to be heard," as required by section 86.

Nor is there any foundation for the position that the justice has no power to impose a fine on a non-attending juror, unless it be done while the cause in which he was summoned is pending. The statute has provided means for the progress of the cause notwithstanding the non-appearance of jurors summoned, by authorizing the justice to direct the constable to summon bystanders, or in certain cases, to issue another venire. (2 *R. S.* 244, §§ 101, 2.) And the orderly administration of justice by no means demands that proceedings in the pending cause should be arrested or suspended until the defaulting jurors can be brought in and tried and fined. Such a requirement would put it in the power of a juror who could elude process, either to escape the fine or prevent the determination of the suit in which he was summoned until he could be forced or persuaded to come in and be tried for his contempt.

It was also urged, on the argument, that the statute contemplates that an action be brought for the penalty against the defaulting witness or juror. This objection is readily overcome by collating the several sections together and bearing in mind the essential difference between the *imposition of a fine* by the justice and the rendition of a judgment on the trial of an issue of fact. The 85th section, above quoted, subjects the contemptuous witness to such fine not less than 62 cents nor more than ten dollars, "*as the justice shall think reasonable to impose, unless some reasonable cause or excuse be shown by his own oath or the oath of some other person.*"

The 86th section declares that the justice may *impose the fine* if the witness be present and have an opportunity to be heard against the imposition thereof. The 87th section directs the justice to make up and enter in his docket a *minute of the conviction* and of the cause thereof, and declares that such conviction shall be *deemed* a judgment in all respects at the *suit of the overseers of the poor of the town.* Section 88

directs the mode of collecting the fine by execution against the goods and person of the *delinquent*, and the 89th section directs the payment of the amount of the fine imposed, when collected, to the overseers of the poor of the town, for the use of the poor. These several provisions are quite incongruous with the idea of a formal action before the justice who issued the venire, or any other, to recover a forfeiture upon the trial of an issue of fact, *with or without a jury*, as the parties may elect. What would be the issue to be tried in such an action? Would it be the regularity of the venire? the truth of the return? the sufficiency of the cause or excuse as shown by the *delinquent's own oath or the oath of some other person?* If there be a jury trial, (as certainly there may if an action must be brought) are the jury to impose the fine? or upon what finding of theirs is the justice to declare the amount he "shall think reasonable to impose?"

On the other hand, if we regard these sections as simply providing for the punishment of a contempt in disobeying the subpœna or venire of the court, to be tried and disposed of by the justice whose process is contemned, with leave to the delinquent to purge his contempt by his own oath if he can, there is no difficulty in reconciling them with each other, nor with a just idea of that power of self protection with which every judicial tribunal should be clothed. There seems no room to doubt, therefore, that the statute intends to provide for the punishment of a contempt of the process it has given the justice, by a summary trial or hearing before him. The power to impose the fine is however subject, I think, to one condition which can neither be obviated nor disregarded. It is that "*the witness (or juror) shall be present and have an opportunity of being heard against the imposition thereof.*" (§ 86.) And the justice must have *jurisdiction of the person* of the delinquent by his *actual presence*. This brings us to the important question in the case.

How is the presence of a *non-appearing witness or juror*, who is subject to the penalty of the statute, to be secured, so

that the justice may impose the fine? We have seen that a witness may be brought in for certain purposes by attachment, and being thus "present and having an opportunity to be heard," may be summarily punished for his contempt; but if no such attachment be issued how is he to be reached? And more especially how is the non-attending juror to be reached, to whom the last named attachment is clearly inapplicable?

We look in vain at the several sections of the statute already referred to, for directions as to the means of bringing in such person; but it does not follow that none exist. The court has process—summons, warrant and attachment—and the justice is authorized by statute "to hold a court," "to hear, try and determine" the actions within his jurisdiction, "according to law and equity; and for that purpose, where no special provision is otherwise made by law, such court shall be vested with all the necessary powers which are possessed by courts of record in this state." (2 *R. S.* 226, § 1.)

It is no stretch of the limited jurisdiction of justices' courts to hold that where *a power is expressly conferred upon them*, but the manner of exercising it is not prescribed by statute, it may be enforced in the simple, ordinary and reasonable mode of attaining the end, *by use of such process as is conferred to carry out the acknowledged powers of the court.*

The case of *Voorhees* v. *Martin*, (12 *Barb.* 508,) seems to stand upon a similar principle. Voorhies, a justice of the peace, was prosecuted for issuing a warrant for the collection of $24.59, the costs of trying an alleged encroachment on a highway, before a jury of twelve freeholders. The statute simply authorizes the justice to issue a warrant for the collection of *the costs*, if not paid in ten days. (1 *R. S.* 522, § 107.) It is silent as to the amount of the costs, the nature of the items to be allowed, the individual or tribunal to determine the amount, or the manner of ascertaining it. The justice had allowed, as part of the costs, witnesses' fees at the amount taxable in courts of record. The court, without looking into the question as to the correctness of the items, holds

that "it is plain that the justice possesses all needful authority to decide upon *the amount of the costs, as incidental and absolutely necessary to enable him to issue the warrant at all, which the statute requires him to do;* and the determination being a judicial act, that no action could be maintained for enforcing it by process."

As a necessary incident, justices' courts, by authority of the common law, possessed the power to punish for contempts committed in the face of the court. (*Sparks* v. *Martin, Ventris*, 1. *Limus* v. *Benthan*, 2 *Bay*, 1. 1 *Str.* 420. 10 *John.* 393. *Moore* v. *Ames*, 3 *Caines*, 176.) Prior to the revised statutes this power was neither defined, nor the manner of exercising it regulated, by statute. (*See Revisers' Notes to* 2 *R. S. p.* 199, § 274, *&c.*)

The power to punish for contempt was not only incidental, but the mode of enforcing it was also necessarily so. Yet the right of the magistrate to arrest the guilty party, to hold him to a summary trial, and to commit him by warrant on conviction, was unquestionable. Had the power to punish for such contempts been expressly conferred by statute without declaring the mode of exercising it, there can be no doubt that the law would have given the justice, as a necessary incident, full authority to use the ordinary and appropriate process.

In criminal contempts, the power of justices to punish is now defined by statute, and the manner of exercising it prescribed. In the class of contempts that we are considering, the power to punish is clearly conferred; and the most that can be said is, that the legislature have omitted to regulate or prescribe the mode of using it.

Since the legislature have granted the power to fine a defaulting witness or juror, and required, as a condition to its exercise, that he shall be "*present*" before the justice, and "have an opportunity to be heard against the imposition of the fine," it is no departure from sound principle to hold that by necessary implication the justice may use the adequate

process of his court to bring him into his presence and give him such opportunity. This may be either by a summons or attachment of the person; but if a reasonable summons be disregarded, there is no sound objection to the attachment against the person, which is but another name for a warrant.

The 276th section of the act concerning courts held by justices of the peace, (2 *R. S.* 273,) is as follows: "No person shall be punished for a contempt, before a justice, until an opportunity shall have been given him to be heard in his defense, and for that purpose a justice may issue a warrant to bring the offender before him." This section is in immediate connection with the provisions relating to criminal contempts, but its language is broad enough to cover every kind of contempt of which the court may take cognizance. If its true construction would reach the case of a delinquent witness or juror, then process by warrant is expressly given, and the intermediate summons can work no prejudice. Certainly the respondent cannot complain that the justice gave him notice by summons to appear and show his excuse, before resorting to the more effective process.

Our examination of the questions involved in this case, leads us to the following results:

First. That the justice had jurisdiction expressly conferred by statute, of the *subject matter* of the default of the respondent as a juror, with authority to try the question, summarily, and impose the fine, he being present and having an opportunity to be heard.

Second. That the justice had authority to issue the process of his court requisite to secure the "presence" of the respondent, and had jurisdiction of his person on his being brought before him by the warrant or attachment. And

Third. That the proceedings of the justice, on hearing the case and imposing the fine, were judicial, and cannot be overhauled in an action against him; but are subject to review only by further proceedings in the same matter. (*See Moore* v. *Ames*, 3 *Caines*, 170; *Weaver* v. *Devendorf*, 3 *Denio*, 117;

Horton v. *Auchmoody*, 7 *Wend.* 200; *Foster* v. *Hazen*, 12 *Barb.* 547.)

The execution issued by the justice was in conformity to the statute, and authorized the levy and sale of the respondent's property. The appellant established a complete justification, and the judgment of the county court, and of the justice, should be reversed.

Judgment reversed.

[Erie General Term, February 8, 1858. *Davis*, *Greene* and *Marvin*, Justices.]

The Seneca County Bank *vs.* Lamb and others.

A bank subject to the provisions of the safety fund act of April 2, 1829, is expressly restrained, by the 33d section of that act, from taking more than six per cent in advance on discounting paper maturing in sixty-three days; and paper discounted by a bank in violation of this section, is void in its hands.

By force of the terms used the statute prohibits, also, the making of the *contract* by or upon which a greater rate of interest than that specified is taken. Hence, although the contract is executed, so far as relates to the act of discounting, the bank will not be allowed to reap the fruits of the transaction thus prohibited, by a recovery upon the paper discounted.

Where a contract sought to be enforced springs out of a violation of the statutes of the state, the court will leave the parties to such contract where it finds them; withholding from both its aid in enforcing it.

The legislature cannot confer upon a moneyed corporation power to enact by-laws contravening, repealing, or in anywise changing, the statutory or common law of the land. Hence, a provision, in a bank charter, conferring upon the directors power to make and prescribe such by-laws, rules and regulations as shall be needful, touching "the *time*, *manner* and *terms* upon which discounts and deposits shall be made," will be construed as giving to the directors power to make by-laws, &c. to operate upon and control the internal conduct of the business of the bank, merely, and to restrain and direct its own officers and servants in the management of its affairs, and not to affect the public at large, or the rights and interests of third persons.

The Seneca County Bank *v.* Lamb.

MOTION for a new trial, on a case containing exceptions. The issue was tried at the Erie circuit in October, 1857, before Mr. Justice SMITH, without a jury. The action was brought on a promissory note for $1000, made by the defendant Lamb, and indorsed by the defendants Dole and Hill, payable at the Albany City Bank, forty days after date, and dated February 5, 1857. It was admitted, on the trial, that the note was discounted by the plaintiffs, at their banking house in Waterloo, and that on such discounting the plaintiffs took and received at the rate of *seven per cent per annum in advance;* and that the note had no inception before it was so discounted. The charter of the plaintiffs was produced and read in evidence, from which it appeared that they are a moneyed corporation, and were, by their charter, expressly subjected to the provisions of the safety fund act of 1829.

The learned justice ruled, at circuit, that the note having less than sixty-three days to run, and having been discounted, and *the discount taken in advance* by the plaintiffs, at *more than six per cent*, was void in their hands, and directed judgment for the defendants. The plaintiffs appealed from the judgment entered on such decision.

F. E. Cornwell, for the appellants.

John Ganson, for the respondents.

By the Court, DAVIS, P. J. The plaintiffs are a moneyed corporation, created by special charter in 1833. (*Sess. Laws of* 1833, *ch.* 58, *p.* 53.) The 36th section of their act of incorporation is as follows: "The said corporation shall also be subject to the provisions contained in the act entitled 'An act to create a fund for the benefit of the creditors of certain moneyed corporations, and for other purposes,' passed April 2, 1829, so far as the same shall be in force at the time of passing this act." The 33d section of the act referred to provides, that "Every moneyed corporation *subject to this*

act shall be entitled to receive the legal interest established, or which may hereafter be established, by the laws of this state, on all loans by them made, or notes or bills by them severally discounted or received in the ordinary course of business, but on all notes or bills discounted or received in the ordinary course of business, *which shall be mature in sixty-three days from the time of such discount, the said moneyed corporation shall not take or receive more than at and after the rate of six per centum per annum in advance.*" (*Sess. Laws of* 1829, *ch.* 94, *p.* 173.)

It is insisted, on behalf of the plaintiffs, that the 33d section of "the safety fund act," above quoted, is not applied to them, for the reason that in respect to the plaintiffs it was not "*in force at the time of passing*" their act of incorporation, because inconsistent with sections 3 and 24 of the latter act. Section 3 of the charter confers ordinary banking powers on the corporation, "by discounting bills, notes and other evidences of debt," &c. and although, standing by itself, it would confer the right to take the rate of interest established by general laws, yet it can no more be said to be inconsistent with any special law regulating the rate of interest in particular cases, than with the general statute fixing it at seven per cent, and prohibiting the taking of a greater amount, to which it is concededly subject.

The 24th section of the charter confers on the directors power to make and prescribe such by-laws, rules and regulations as shall be needful, touching, (amongst other things,) "2. The *time, manner* and *terms* at and upon which discounts and deposits shall be made and received in and by the bank." Whether this section confers any greater power than pertains, at common law, to all similar corporations to make needful by-laws, rules and regulations, it is not important to inquire. It is limited, in the authority it gives, to the making of by-laws, rules and regulations to operate upon and control the internal conduct of the business of the bank; to restrain and direct its own officers and servants in the manage-

ment of its affairs and not the public at large, nor the rights and interests of third persons. (*Mech. and Farmers' Bank* v. *Smith*, 19 *John.* 115.) If allowed to have an operation beyond this, its validity cannot for a moment be sustained. The legislature cannot confer upon a moneyed corporation power to enact *by-laws* contravening, repealing or in anywise changing the statutory or common law of the land. It is enough, however, to dispose of this point to say that no inconsistency is perceived between the provisions of the charter cited by the plaintiffs' counsel, and the 33d section of the act of 1829; and it follows that the plaintiffs are expressly restrained by that section from taking more than six per cent *in advance* on paper maturing in sixty-three days.

It is further insisted on the part of the plaintiff, that the act in question having simply "prohibited the taking of more than six per cent in such cases, *without declaring void the instrument on which it is taken*, the only consequence is that the plaintiffs are liable to be proceeded against on *quo warranto*, for a violation of their charter, and in respect to the particular transaction, are only liable to refund the excess, in a proper action." To sustain this proposition, the cases of *Fleckner* v. *Bank of the United States*, (8 *Wheat.* 338,) and *Bank of the United States* v. *Waggener*, (9 *Peters*, 378,) are relied upon. In the former of these cases, the note on which the action was brought was made by Fleckner, payable to one John Nelder or order, and negotiated after several mesne indorsements to the Planters' Bank of New Orleans, and subsequently discounted by the Bank of the United States for the Planters' Bank. On such discounting the Bank of the United States deducted interest in advance, at the rate of six per cent, and the question presented to, and determined by, the court, was whether this transaction was usurious. The court held it was not, but that "the authority to discount or make discounts did, from the very force of the terms, necessarily include an authority to take interest in advance." After disposing of this point (the only one involved analogous in any degree to

the case at bar) Mr. Justice Story adds, that "if the law were otherwise," that is, if the transaction were usurious, "it would not follow that the transfer to the bank of the present note would be void so that the maker of the note could set it up in his defense. The taking of interest by the bank beyond the sum authorized by the charter would doubtless be a violation of the charter, for which a remedy might be applied by the government; but as the act of congress does not declare that it shall avoid the contract, it is not perceived how the *original defendant* could avail himself of this ground to defeat a recovery." The note of Fleckner was valid in its inception. It had been negotiated to the Planters' Bank, and in their hands, so far at least as the question of usury was concerned, was a valid instrument. The Planters' Bank negotiated it to the Bank of the United States, and the latter discounted it by taking interest in advance at the rate allowed by its charter. If taking that sum in advance had been usury, it is difficult to see how it would have affected the validity of the paper, as against the maker of the note, who was in nowise connected with the transfer to the Bank of the United States. The most that can be claimed for the *obiter* suggestion of the very learned judge is, that since no law had declared a note valid in its inception, held by a *bona fide* holder, and by him subsequently transferred, *void for usury in the transfer*, the maker, who was not connected with the transfer, could not avail himself of the alleged usury to defeat a recovery. But if the learned judge intended to go farther, and to hold that a bank can enforce paper discounted by it in violation of the express provisions of its charter, and having no inception except upon such discount, it is enough to say that the point was not involved in the case before him; and whatever respect may be due to the opinion of so eminent a jurist, the conclusion is not obligatory as authority.

It is more difficult to perceive how the case of the *Bank of the United States* v. *Waggener*, above cited, has any application to the one at bar. In that case the note on which the

suit was brought was not discounted by the Bank of the United States, but was taken in exchange for notes of the Bank of Kentucky, and a check of the former on the latter bank nominally equal in amount to the note. It reserved on its face the legal rate of interest only. The notes of the Bank of Kentucky were depreciated in their marketable value at the time of the exchange, and the case resolved itself, to use the language of Story, J., "into this inquiry: whether upon the evidence there was any corrupt agreement or device or shift to reserve or take usury." The instructions prayed for by the plaintiffs, submitting this question to the jury, had been refused; and the court, in substance, held the refusal improper, as the exchange of the notes was not *per se* usurious, but would depend for its validity on the intent of the parties in making it, which was a question of fact to be found by the jury. No principle on which the plaintiffs in this action can stand seems to be justly deduci from either of the cases cited.

In determining, however, the question whether the only remedy is by action to recover back the excess beyond six per cent, or by *quo warranto* on behalf of the state, it is necessary to consider whether the legislature intended to prohibit the act or contract. Upon the facts proved on the trial of this case the parties in legal effect mutually agreed the one to deliver and the other to receive the note in suit upon a discount payable in advance at the rate of seven per cent; and this agreement, so far as the execution and delivery of the note and the taking of the discount are concerned, was consummated. But the statute expressly declares that upon such a note "the corporation *shall not take or receive more than at and after the rate of six per cent per annum in advance.*" This language is unequivocal and imperative. It forbids in plain words the act of taking or receiving beyond the specified rate, and by force of the terms it prohibits the making of the contract by or upon which a greater amount is taken. If a contract were reduced to writing by which the bank bound itself to discount for the defendants notes such as the one in suit at seven

per cent in advance, and an action were brought to enforce the contract or recover for its breach, no lawyer would insist that a recovery could be had upon it; its illegality would be transparent, and the bank would have the full benefit of the rule, *potior est conditio defendentis.* But here the contract is executed, so far as relates to the act of discounting; the bank has performed the agreement, has taken the note and the illegal discount upon it, and now comes into court *and asks to enjoy the fruits of the transaction.* True, say the plaintiffs, the act or agreement under which we acquired title to the note was prohibited by law; nevertheless the law should aid us to enforce the note by suit and then punish us for acquiring it unlawfully. "The answer," to quote the language of Johnson, J., in the *Bank of the United States* v. *Owens*, (2 *Peters*, 257,) "would seem to be plain and obvious, that no court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they then become auxiliary to the consummation of violations of law?"

The long established maxim of the law, "*ex turpi causa non oritur actio*," is equally applicable where the act or contract is prohibited by statute, either expressly or by implication, as when it is *contra bonos mores.* "It is quite clear," says Lord Eldon in *Ex parte Dysler*, (2 *Rose*, 351,) "that a court of justice can give no assistance to the enforcement of contracts, which the law of the land has interdicted;" and in *Aubert* v. *Maze*, (2 *B. & P.* 374,) it is expressly affirmed that there is no distinction, as to vitiating the contract, between *malum in se* and *malum prohibitum.* In *Watts* v. *Brooks*, (3 *Ves. Jr.* 612,) the court says: "There is nothing unusual in this transaction, but it is against a prohibitory statute. I doubt a little the policy of the act, but I cannot allow it to be argued that you can break a law covertly. The court will not execute the contracts."

The English cases in which this maxim has been applied and enforced are numerous and very decisive. (*See Broom's*

Legal Maxims, 4th ed. 463, *and notes.*) Our own courts have not hesitated to apply the maxim in its true spirit whenever the occasion has demanded. *Leavitt* v. *Palmer*, (3 *Comst.* 19,) and *Talmage* v. *Pell*, (3 *Seld.* 328,) are strong cases to establish the invalidity of contracts made in violation of the express or implied prohibition of statutes; and the right of the receivers of corporations to set aside the illegal transaction for the benefit of creditors. In *Swift* v. *Beers*, (3 *Denio* 70,) the court refused to permit a recovery against the guarantor of a note, which on its face, was a violation of the act of 1840, prohibiting the issuing of post notes by banking associations.

But to enumerate here the various cases in which "this principle has been practically applied, would be to incur the imputation of vain parade." Enough has been said to show that where the contract sought to be enforced, springs out of a violation of the statutes of the state, the court "will leave the parties to the illegal transaction where it finds them, withholding from both its aid in enforcing it." (*See Justice Sill in Tylee* v. *Yates*, 3 *Barb.* 228.) "It is upon that ground the court goes, not for the sake of the defendant," says Lord Mansfield, "but because they will not lend their aid to such a plaintiff."

The plaintiffs' counsel argued that the amount of the excessive interest taken in this case, is so small that the court should rather attribute its taking to mistake than to a corrupt and intentional violation of the statute; but the case is not open to this suggestion. The rate of seven per cent was knowingly taken, and this operates as a violation of the statute whether the officers of the bank knew of its existence and intended to disregard it or not. Corporations, like natural persons, must be held to intend the consequences of their acts. "It is sufficient," says Lord Stowell, "if there is a contravention of the law, if there is a *fraus in legem;* whether that may have arisen from mistaken apprehension, from carelessness, or from any other cause, it is not material to inquire. In these

cases it is not necessary to prove actual and personal fraud." (*The Reward*, 2 *Dods. Adm. R.* 271.)

The case was open to the plaintiff to show the facts affirmatively, as they were bound to do if they would excuse themselves, on the ground of actual mistake in calculation. In the absence of such evidence the law must presume against them.

From these conclusions, it follows that this court cannot lend itself to aid the plaintiffs to secure the fruits of their infraction of the statute, and the judgment below must be affirmed.

[Erie General Term, February 1, 1858. *Davis*, *Marvin* and *Greene*, Justices.]

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26 603
67 63

Cheesbrough *vs.* Agate.

Upon a covenant by A. to pay C. all sums of money which shall be recovered in an action brought by C. against H. and wife, the covenantor is not liable, *it seems*, if the only judgment recovered in that action is for the payment of a sum of money out of the separate estate and property of the wife.

Where a referee, upon the facts proved before him, finds the law to be that the defendant is liable; to which finding no exception is taken, the defendant cannot, upon appeal, insist that he is not liable, upon the facts appearing before the referee.

A case must be prepared, and settled by the referee, containing the exceptions taken during the trial, or afterwards; and if questions of law are not incorporated therein, they cannot be reviewed on appeal.

ON the 22d day of March, 1854, an action, wherein Robert D. Cheesbrough was plaintiff, and George V. House, and Caroline E. House, his wife, were defendants, was pending in the superior court of the city of New York, to recover $500, with interest, remaining unpaid and unsecured, the balance of $3500, consideration money for household furniture purchased by House and wife, or one of them. In that suit a preliminary order of injunction was granted, on the 26th of September, 1853, and a final order on the 1st of October, 1853, restraining said House and wife, their agents, &c. from removing said furniture, &c. These injunctions were in force

on the 22d of March, 1854. Joseph Agate and Caroline E. House were brother and sister; John Agate was their father. In March, 1854, the plaintiff was informed that Caroline E. House had, prior to the action in the superior court, made a chattel mortgage on said furniture to her father, John Agate, for $4500, and that Joseph Agate was proceeding to foreclose the said mortgage and to sell the furniture under the same, and by this means to supersede and defeat the injunctions in the superior court, prevent the plaintiff from collecting his judgment when obtained in the superior court, and thus render it of no avail; House and wife being insolvent. An action was therefore commenced, on the 20th day of March, 1854, in the supreme court, by the said Robert D. Cheesbrough, against John Agate, Joseph Agate, George V. House and Caroline E. his wife, to restrain the defendants from enforcing the said mortgage, and from removing or selling the furniture under it, and to set it aside as fraudulent and void as against creditors, and as against the plaintiff. An injunction was granted in this action. The papers in this action were served upon all the defendants except John Agate. The action against John Agate, Joseph Agate, &c. in the supreme court, was pending on the 22d of March, 1854. The first above mentioned action in the superior court, and the above mentioned action in the supreme court, being both pending on the 22d day of March, 1854, Joseph Agate made a covenant entitled in both actions; "I, Joseph Agate, one of the defendants in the last above entitled action, in consideration of discharging all the injunctions in said several actions, and discontinuing the last above entitled action, do hereby covenant, promise and agree, to and with the above named plaintiff, to pay all sums of money which shall or may be recovered in the first above action, against the said defendants, George V. House and Caroline E. House, together with all costs in said action first above named."

The injunctions were dissolved, and the action against John Agate, Joseph Agate, &c. in the supreme court discontinued.

The plaintiff recovered judgment in the said first action, in the superior court, on the 30th day of December, 1854, for $674.94, *to be collected out of the separate property and estate of the said Caroline E. House.* Execution was issued upon said judgment, and returned, no property, &c. Notice of said judgment was sent in January, 1855, to the attorneys for House and wife, and also the attorneys for the defendant, Agate, in the other suit. Special notice of said judgment was given to Joseph Agate, and demand of payment of the same made upon him, May 2d, 1855. The subject matter of the first action in the *superior* court, against House and wife, and the second action in the *supreme* court, against John Agate, Joseph Agate, &c. was the same. Joseph Agate had no interest in the furniture, but he afterwards purchased a part of it, and became concerned or interested in it. The object of the agreement or covenant of Joseph Agate was to relieve the furniture from the injunction. This action was brought by the plaintiff against Joseph Agate, upon his covenant, to recover the amount of the judgment rendered in the action in the superior court against House and wife. This action was tried before a referee, who made his report, in favor of the plaintiff, for $773.36, besides costs. Judgment was entered for the plaintiff thereon, for $986.72, debt and costs, and from that judgment the defendant appealed.

Niles & Bagley, for the appellant.

S. W. Judson, for the respondent.

INGRAHAM, J. The defendant entered into a covenant with the plaintiff, by which he agreed to pay the plaintiff all sums of money which should be recovered against George V. House and Caroline E. House, in a certain action then pending in the superior court. Subsequently the plaintiff recovered in that action a sum of money, out of the separate property and estate of the defendant Caroline E. House, the

wife. No judgment was entered against either of the defendants, other than a judgment for a sum of money to be collected out of the separate estate. Execution was issued in the same form. The only question is, whether under this covenant the defendant is liable. His only undertaking was to pay any sum of money which should be recovered against both the defendants in that action. He was a surety: as such he has a right to insist that his contract shall be construed strictly. He can only be held liable on the condition contained in it, viz: to pay any moneys for which both defendants shall be held liable. A recovery against the separate estate of one, does not bring the case within that condition, according to its literal interpretation; and the defendant's liability may well be doubted. But the case, as it is submitted to us, is defective, and the defendant cannot raise that question on these papers. Whether upon the facts proven, the defendant is or is not liable, is a question of law. The referee has found upon the facts, and has found the law upon those facts to be that the defendant is liable. To this finding no exception has been taken. It is now well settled, that a case must be prepared and settled, by the referee, containing the exceptions taken during the trial or after the trial, and if not so incorporated, questions of law cannot be reviewed on appeal. I need only refer to the cases of *Hunt* v. *Bloomer*, (3 *Kern.* 341,) and *Johnson* v. *Whitlock*, (*Id.* 344,) as settling this practice, beyond doubt.

We think, therefore, the appeal in this case is not well taken, and that the same should be dismissed, and the judgment affirmed, with costs.

[New York Special Term, March 1, 1858. *Ingraham*, Justice.]

KIRBY *vs.* HEWITT and others.

26 607
528 220
24a 559

The admissions of one member of a firm are not evidence to show that the other persons sought to be made liable are also partners. They are only evidence against the party making them.

The plaintiffs sold goods to H., and charged them to him, and afterwards took his note in payment of the account. They then sought to charge the defendant, as being a partner of H., and relied upon the fact that there had been a partnership between them, under the firm name of H. & Co., and that no notice of the dissolution had been given to the plaintiffs, and upon the declarations of H. that the defendant was still interested with him in the business, and that the name had been changed for the purpose of collecting the debts. *Held*, that this was not sufficient to establish the liability of the defendant as a partner when the debt was contracted.

Held also, that after the partnership had been dissolved, no liability could be created upon its credit, unless the name of the firm was used in making the purchases.

Dealers who, after a dissolution, but without notice thereof, trust the firm, are protected; but where the name of the firm is altered, creditors cannot hold the members of a different firm liable because they have not been notified of such dissolution.

ACTION for goods sold and delivered, brought against the defendants as partners.

INGRAHAM, J. Upon the trial of this cause the defendants were sought to be made liable as partners. The goods were sold to the defendant William R. Hewitt, and charged to him, on the plaintiffs' books. He selected all the goods but one parcel, and ordered the bill made out to him. Afterwards the plaintiffs took the note of William R. Hewitt in payment of the account. There was no evidence showing that Henry was a partner, either from his own admission, or from any proof of an agreement between the defendants. The plaintiff relied upon two facts, viz: That there had been a partnership between the defendants, under the firm name of Hewitt & Co., and that no notice of dissolution had been given to them, by the defendants, and the declarations of William that Henry was still interested with him in the business, and that the name had been charged for the purpose of collecting the debts.

It is now well settled that the admissions of one member of a firm are not evidence to show that the other persons sought to be made liable are also partners. They are only evidence against the party making them. (*McPherson* v. *Rathbone*, 7 *Wend.* 216.)

Nor does the fact that a previous partnership had existed between the defendants supply the defect. That firm had been dissolved, and no liability could afterwards be created upon the credit of the firm, unless the name of the firm had been used in making the purchases. Dealers who trusted the firm after dissolution, without notice thereof, are protected; but where the name of the firm is altered, the vendors cannot hold the members of a different firm liable, because they have not been informed of such dissolution. They were informed that the name was changed. The credit then was not given to the old firm of Hewitt & Co., but to a new firm under the name of William R. Hewitt. They were bound to ascertain to whom they were giving credit in the new firm, and the subsequent declarations of William do not in any manner affect Henry. A case involving these principles may be found in *Thorn* v. *Smith*, (21 *Wend.* 365.) In that case an attempt was made to charge a firm for money borrowed by one member of it. It was held that the declaration of the partners, though made before dissolution, that the money was borrowed for the firm, would not bind the other members of the firm, where the name of the firm was not used in creating the debt. The case is much stronger against such admissions after the firm was dissolved. If the note of the firm is sued then the *onus* rests upon the defendants to show that the indebtedness was not for the firm; but if another name is used, then the persons seeking to make them liable must show the partnership, or the assent of the partners. (*Williamson* v. *Johnson*, 1 *Barn. & Cress.* 146. *Palmer* v. *Stephens*, 1 *Denio*, 476.) The evidence in this case was not sufficient to establish the liability of the defendant Henry as a partner when the debt was contracted.

The non-production of the note given by William Hewitt

in his name for the goods, would be a fatal objection to the recovery, and if lost a bond of indemnity should have been given for it, and the action should have been founded thereon. As this objection was not pressed upon the trial, the defendants ought not to avail themselves of it here.

The verdict was against the evidence on the other point, and a new trial must be ordered on payment of costs.

[New York Special Term, March 1, 1858. *Ingraham*, Justice.]

Meyer and others *vs.* The City of Louisville.

The court, at general term, on reversing a judgment rendered on the verdict of a jury, or on the trial by the court or a referee, cannot render a judgment in favor of the appellant. It should order a new trial.

MOTION to correct a judgment entered at a general term.

Ingraham, J. Upon the trial of this cause before a single justice without a jury, the court rendered judgment for the defendants. The plaintiffs appealed to the general term, and the court reversed the judgment appealed from and rendered judgment for the plaintiffs. A motion is now made to correct the judgment so rendered, and to order a new trial, instead of judgment for the plaintiffs. This involves the question whether the general term can, in reviewing a judgment rendered on a verdict of a jury or on a trial by the court or referee, render a judgment in favor of the appellant.

In *Astor* v. *L'Amoreux*, (4 *Sandf.* 524,) the superior court in general term reversed a judgment rendered upon the verdict of a jury, and ordered judgment for the appellant. In that case Justice Duer says, "We can perceive no reason for subjecting the parties to a new trial which we know must re-

sult in the same judgment that we are now ready to pronounce." On appeal to the court of appeals, (4 *Selden*, 107,) it was held that "the superior court erred in reversing the judgment and ordering a final judgment for the defendant. It should have ordered a new trial, which was all it was authorized to do."

In *Marquet* v. *Marquet*, (2 *Kernan*, 340,) the general term of the supreme court, instead of ordering a new trial, reversed the judgment given at special term and ordered judgment for the defendant, of dismissal of the complaint. The court there say, "when the facts are ascertained by a special verdict, or any other form of finding allowed by the law, the question which party is entitled to judgment arises upon appeal and a judgment disposing of the whole case may be given at the general term. But when the case is brought for review to the general term upon an allegation of error on the trial, in the process of ascertaining the facts, the only judgment which can properly be given for the appellant is one ordering a new trial. (*See also Cobb* v. *Cornish*, 15 *How. Pr. Rep.* 409.)

There is one other case where the court of appeals has ordered judgment for the appellant, which was the fact in the case last cited, viz. where the judgment of the special term was reversed by the general term. On an appeal from that decision the court of appeals held that they could reverse the judgment of the general term and affirm the judgment of the special term.

The order made at general term must be amended so as to direct a new trial; costs to abide the event.

[New York Special Term, March 1, 1858. *Ingraham*, Justice.]

CHAMBERLAIN *vs.* TOWNSEND.

26 611
29 575
30 628
35 436
36 428
42a 450
42a 610

Where the maker of a promissory note annexes thereto a certificate that the same is given for value, and will be paid when due, and the note is afterwards sold to a third person, for an amount less than should have been paid for it if discounted at legal interest, the maker is estopped by the certificate, from setting up the defense of usury.

APPEAL from a judgment entered upon the report of a referee.

INGRAHAM, J. The defendant made two notes to his own order, and delivered them to Holley, for the purpose of taking up other notes of the defendant then past due. To each note he annexed a certificate that the same was given for value, and would be paid when due. On this certificate the note was sold to the plaintiff for an amount less than should have been paid for it if discounted at legal interest, and the only question is, whether the defendant is estopped from setting up the defense of usury, in consequence of the certificate.

It has been repeatedly held, and must be considered as the settled law of this court until otherwise decided by the court of appeals, that the doctrine of estoppel applies to one who represents a note which he is about to sell to be business paper when in fact it is not, so as to preclude him from setting up the defense of usury. (*Holmes* v. *Williams*, 10 *Paige*, 326. *Watson's Ex'rs* v. *McLaren*, 19 *Wend.* 557. *Dowe* v. *Schutt*, 2 *Denio*, 621. *Clark* v. *Sisson*, 4 *Duer*, 408. *Truscott* v. *Davis*, 4 *Barb.* 495.)

The only difference between this case and those above referred to is, that the defendant represented these notes to have been given for value. I see no difference between that representation and one that the paper is business paper. Each conveys the same idea, viz: that the notes have been parted with for a sufficient consideration to give them validity, and each representation is intended for the same purpose, viz. to induce a purchaser to take the notes without fear of the defense of usury.

In the present case no one but the defendant, who is both maker and indorser, is affected by the application of this rule, and there is no hardship or injustice in saying to him that he cannot deny now, what he represented the note to have been when the plaintiff was induced to purchase it. A contrary rule would hold out to men a temptation to deceive others by falsehood and then allow them to take advantage of such falsehood to escape the liability so incurred.

The findings of the referee are conclusive as to the facts, and there was no error in the law as applied to them

The report of the referee, and the judgment entered thereon, should be affirmed with costs.

[New York Special Term March 1, 1858. *Ingraham*, Justice.]

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26 612
30 519
36a 149

Macondray and others *vs.* Thomas Wardle and Belinda Wardle.

In an action against husband and wife, to compel the application of certain real property, standing in the name of the wife, to the payment of a judgment recovered against the husband, upon the ground that it in reality belongs to the husband, and was bought in the name of the wife, in order to defraud the creditors of the husband, the wife cannot be examined as a witness, by the plaintiff.

The principle of the common law, forbidding husband and wife to be witnesses for each other, has not been changed by the provision of the code, allowing a party to call the adverse party as a witness.

The wife not being a competent witness in an action against the husband alone, making her a party to the record will not remove the incompetency.

Nor are the admissions of the wife competent testimony, to sustain a suit against husband and wife, affecting property standing in her name.

MOTION for a new trial, after a judgment upon a verdict at the circuit.

Ingraham, J. The plaintiffs seek to compel the application of certain real property, standing in the name of Belin-

da Wardle, to the payment of a judgment recovered against her husband, Thomas Wardle, upon the ground that it in reality belonged to the husband, and was bought in the name of the wife, to defraud the creditors of the husband.

Upon the trial of the cause the plaintiffs called, on their behalf, Belinda Wardle as a witness, who was objected to and excluded by the court. The plaintiffs then offered to call her against herself only. This, also, was objected to, and the witness was excluded. The same offer was made after the examination of Thomas Wardle had been read, and the testimony again excluded. To all these rulings the plaintiffs' counsel excepted.

It is contended that under the present system the wife may be examined as a witness, where she is a party to a suit.

I did not understand the counsel upon the argument as urging the right to examine the wife against the husband, when the action was against him alone. On the contrary, he concedes, in his points, that in such a case the wife could not be examined. Since the adoption of the code, the decisions have been numerous, that in such cases the wife cannot be a witness for or against her husband. (*Pillow and wife* v. *Bushnell*, *Code Rep.* 19. *Erwin* v. *Smaller*, 2 *Sandf.* 340. *Hasbrouck* v. *Vandervoort*, 4 *id.* 596. *Arborgast* v. *Arborgast*, 8 *How. Pr. Rep.* 297.)

The plaintiffs urge that the proposed examination of the wife was only against herself, and that she was so offered. I am at a loss to see how that result could follow from her examination. The object of the action was to prove a fraud between herself and her husband. There could be no judgment against her unless against the husband also, and there is no propriety in saying that the examination would not affect the husband as much as it would the wife. If the plaintiffs' position is true, that the house and lot belong to the husband, though in the name of the wife, then the object of the examination is to prove that the conveyance to her was for his benefit, and the result would be the applica-

tion of his property to the plaintiffs' use, in payment of the debt due them. Surely it cannot be said to be a case in which the husband has no interest.

It was also urged, in favor of the wife's examination, that as on filing a bill of discovery under the old system, in equity, the answer of the wife could have been read in evidence, it was proper she should be examined now, in the place of such discovery. The plaintiffs have the wife's answer now, in the case. Such answer, I suppose, might have been read on the trial. That answer contains a full denial of the plaintiffs' charges, and it is not probable that she would have filed any other answer if the suit had been under the old system. The wife was no more competent as a witness, in equity, under the old system than she is now.

As I have before remarked, the wife could not have been competent if the action were solely against the husband. Making her a party to the record does not remove the incompetency. In *Symonds* v. *Peck*, (10 *How. Pr. Rep.* 395,) it is said, "the principle is undoubtedly sound, that a person incompetent to testify for a party, cannot be rendered competent by being made a party."

If the code has not changed the rule as to the examination of husband and wife, for or against each other, the numerous decisions before the code, which are referred to in the cases before cited, decide this question. Such is stated very strongly by Judge Duer, in *Hasbrouck* v. *Vandervoort*, (4 *Sandf.* 597,) and he adds: "The law is, that husbands and wives are not competent witnesses for or against each other, in any suit in which either is a party, or in the event of which either has a direct and certain interest." In *McGuire* v. *Worden*, (3 *E. D. Smith*, 355,) this question was examined in relation to the right of the wife, when sued with her husband, to offer herself for examination, after the plaintiff or his assignor had been examined in his own behalf. Although the court there expressed a doubt whether the code had not in such a case altered the law, so as to admit both husband

and wife as witnesses, with the assent of the other; still the court unanimously sanctioned the principle that in no case could either be offered as a witness against the other.

The case of *Hasbrouck* v. *Vandervoort*, in the court of appeals, (5 *Selden*, 153,) confirms, fully, the rule that the code has not altered the law as it existed previously. The chief justice says, "the policy of the law, in order to ensure conjugal confidence, has laid down a definite rule, that in no case shall husband and wife be allowed to give evidence for or against each other." And he further adds: "the sections of the code referred to have not touched the effect of the relation of husband and wife upon the competency of witnesses." The admissions of the wife to the same effect, were offered in evidence. The objection which has been considered, to her testimony under oath, would apply with much greater force to admissions made by her, not under oath. The point is expressly decided in *Lay Grae* v *Peterson*, (2 *Sandf.* 338,) in which we concur.

Judgment affirmed.

[New York Special Term, March 1, 1858. *Ingraham*, Justice.]

Hamilton *vs.* Lomax.

A promise of marriage, by an infant, is not binding, and an action for the breach thereof cannot be maintained.

A person seduced cannot maintain an action for the seduction.

The only mode in which an action for seduction can be maintained is by bringing it in the name of some person having a right to the services of the female seduced, in which action damages may be recovered, not only for an actual loss of service, but for a sum sufficient, also, to punish the seducer.

MOTION by the defendant in an action for seduction, to be discharged from arrest. The plaintiff, Janet Hamilton, was twenty, and the defendant seventeen years of age. It appeared in evidence that the intimacy between the parties commenced at Toronto, Canada; that the parties came to the

city of New York together, under the pretended relationship of brother and sister; that they there had connection with each other, and the defendant promised to marry the plaintiff. The promise of marriage was corroborated by the evidence of a Mr. Nash, who heard the defendant say he intended to marry the plaintiff, when he heard from his father, who lived at Manchester, in England.

INGRAHAM, J. No complaint is submitted, on the motion, if any has been served, and it is difficult to say whether the arrest was originally intended to have been for a breach of promise of marriage, or for seduction. Upon the argument of the motion, the plaintiff's counsel stated it was not for the breach of promise of marriage, and sought to sustain it for the seduction.

The evidence so fully establishes the infancy of the defendant that no attempt has been made to contradict it, and this fact has probably led to the abandonment of any proceeding for the breach of such a promise. The cases of *Hunt* v. *Peak*, (5 *Cowen*, 475,) and *Holt* v. *Ward*, (2 *Strange*, 937,) fully establish that a promise of marriage by an infant is not binding, and an action for the breach thereof cannot be maintained. See also *Cameron* v. *Alebay*, (1 *Maul.* 76.) The ground on which the plaintiff claimed to sustain the arrest was for the seduction, alleging that the plaintiff had been defrauded by the false promise of the defendant. In no instance, however, is a promise to do something "*in futuro*" sufficient to sustain an action for deceit. All promises to pay money in consideration of goods to be sold, or for services to be rendered, are of the same character; and although they are not performed, still no action for fraud can be maintained upon them; the action must be on the promise itself. This case does not show any representation, or any promise, other than the promise to marry. So careful have the courts been to keep these causes of action separate, that in a case for seduction it was held to be erroneous to admit evidence of a promise

of marriage, in attempting to prove the seduction. (*Gillet* v. *Mead*, 7 *Wend.* 193.) No case has been cited to show that a person seduced could maintain an action for such seduction, because the person seduced assents thereto. The only mode in which the action has ever been maintained has been by bringing such action in the name of some person having a right to the services of the person seduced, and allowing damages to be recovered, not only for actual loss of service, but for a sum sufficient also to punish the seducer; but such action can never be maintained in the name of the party seduced.

In the present case, from the plaintiff's own statement, it appears that she is under 21 years of age and lived with her mother. The latter has a right to bring an action for the loss of service of her daughter. In that action full recompense could be obtained for any injury caused by the defendant.

The statement of the plaintiff's first acquaintance with the defendant, as given by herself, is not of such a character as to relieve the case from suspicion. She states that her first acquaintance with the defendant was in the streets of Toronto after dark, and that she remained with him for three quarters of an hour, in the street; and her subsequent statements of her relations with him throw much doubt upon any supposed attempts of the defendant to deceive her. It is enough, however, to say that the law does not give the plaintiff a right of action, in her own name, for the seduction. It may be that there are some cases where such an action, if allowed, would give a party the redress to which she was entitled; but the legislature has not thought fit to authorize such an action to be brought, and until they do the courts have no authority to sanction the bringing it. As the law now permits parties to be witnesses in their own behalf, some of the difficulties which have heretofore stood in the way of allowing a female, who has been seduced, to maintain an action in her own name, have been obviated; but it is for the legislature, and not the courts, to apply the remedy. The defendant must be discharged.

[New York Special Term, March 1, 1858. *Ingraham*, Justice.]

26 618
62h 236
26 618
28 198
39 336
32h 536
80a 29

MARY NORTON, administratrix &c. of Thomas Norton, *vs.* E. WISWALL and J. P. WISWALL, ex'rs &c. of E. Wiswall.

A party who has from the public authorities a license to run a ferry, and has leased the same to another person, for a definite period, who is conducting the same independently of the lessor, by his own men and means, is not liable in damages for a death caused, during that period, by the wrongful act or negligence of a servant of the lessee.

THIS action was brought to recover damages, under the act of 1847, on account of a death caused by the wrongful act, neglect or default of the defendant's testator. (*Laws of* 1847, *ch.* 450.) The cause was tried at the Rensselaer circuit, in June 1856, before Mr. Justice GOULD and a jury, and a verdict was given for the plaintiff for $3000. The death occurred by the swamping or upsetting of a skiff boat on the 13th of October, 1854, on its passage across the side cut ferry from Troy to West Troy, rowed by a Canadian of the name of Yeppo or Yippo, who was in the employ of Robert Morrison, the latter being the lessee of Ebenezer Wiswall, of said ferry at a yearly rent, and the owner of the ferry house where the toll was taken, and of the boats and implements used in conveying passengers across the ferry, and having the entire direction, management and control of the ferry. On proof of these latter facts, the defendant's counsel moved for a nonsuit and dismissal of the complaint. The motion was denied, and the defendant excepted. The court held that the defendant was liable for the acts of the ferryman, and charged the jury that if the accident occurred through the negligence of the ferryman, unaccompanied with negligence on the part of the plaintiff's intestate, or his fellow passengers, the plaintiff was entitled to recover. The defendant excepted. The defendant's counsel requested the court to charge, that if the jury found that Morrison, the lessee, was executing an independent employment, and that Wiswall did not in any degree interfere with his business, either in the employment of the boatmen or in giving, or

assuming to give, any directions whatever, as to the running of the ferry, the defendant could not be charged with the negligence of Morrison's servant or agent, and the plaintiff ought not to recover. The court refused so to charge, and the counsel for the defendant excepted. The defendant also excepted to that part of the judge's charge which declared that passengers who are in danger in a ferryboat are excused for their conduct, though it may have contributed to the accident; unless it was plainly wrong, and that they are entitled to the benefit of any doubt on that subject; and also to that part of the charge which declared that if the rising of the passengers in the boat produced the accident, and they had reasonable cause for believing themselves in danger, they were not responsible for the exercise of great presence of mind, and that their activity, from fear, did not excuse the carrier.

The court having charged, in substance, that if an improper act on the part of the passengers concurred in producing the injurious result, the plaintiff could not recover, declined to vary the charge so as to state that the rash, imprudent or indiscreet conduct of any of the passengers, in rising from their seats and contributing to the accident, would bar a recovery by the plaintiff. To this refusal the defendant's counsel excepted. The court also declined further to vary the charge, on this point, so as to state that the plaintiff could not recover unless she showed that the plaintiff's intestate was wholly free from fault, and that thus the injury was wholly caused by the carelessness or negligence of the defendant. To this refusal, also, the defendant's counsel excepted. The defendant also excepted to the admission of evidence tending to show that the overseer of the poor was called upon to assist the plaintiff in the winter succeeding the accident, and found her and her family very needy, and rendered them assistance.

The defendant moved the court for a new trial, upon the judge's minutes, which motion was denied, and judgment en-

tered for the plaintiff. The defendant made a case and exceptions and appealed from said judgment, to the general term of the court.

David L. Seymour, for the appellants.

Daniel Gardner, for the respondent.

HOGEBOOM, J. This case presents, distinctly, the specific question whether a party who had from the public authorities a license to run a ferry, and had *leased* the same to another party for a definite period, who was conducting the same independently of the lessor, by his own men and means, is liable for a death caused during that period, by the wrongful act or negligence of a servant of the lessee. I think the principle is well settled on authority, that he is not so liable; but as the contrary is strenuously maintained by the learned counsel for the plaintiff, and as the principle itself is of large application, and must control a considerable number of suits growing out of the occurrence in question in this case, it may be well to re-state some of the reasons upon which it rests.

I am not able to see how any person can be made responsible for a particular transaction, or the consequences flowing from it, unless he has been in some way personally engaged in it, or instrumental in bringing it about, or the relation between him and the person who inflicts the injury complained of, be that of partner, or master and servant, or some other involving the principle of agency.

Where one is the master or principal of another, he is responsible for his acts, within the scope of his employment, because he has conferred authority upon the latter to do the act, and because he has the power and the legal right to control his conduct. Where one is the partner of another, he is liable for his acts within the scope of the partnership, because he has agreed to be so, and because the very nature and object

of this relation imply that each acts with the authority and assent of the other. But where the parties stand towards each other simply in the light of contracting parties, having no relation towards each other which draws into operation the principle of agency, the rule does not apply. Such is the condition of lessor and lessee. The lessee, for the time being, takes the place and assumes the duties and obligations of the lessor. He is a substitute for the lessor. He acts independently of him. He cannot be controlled by him. He has an agreement under which, in consideration of a stipulated compensation, he is, for the time being, clothed with the rights and responsibilities of the lessor. The lessee of a house or a farm is, during the continuance of the lease, owner—at least *quasi* owner. He has the rights of owner. The lessor cannot, without his consent, set foot upon the premises. The lessee of a ferry has similar and equal rights. By the very terms and legal effect of the lease the lessor is displaced from the possession and temporary ownership of the ferry. He cannot run it. He cannot control it. He cannot give directions in regard to it. He has no more rights in regard to it than a third person. To attempt to take possession or to exercise control, or to give directions, would be to make him an usurper, an intruder—a trespasser. How then can he be liable for the acts of the lessee? The servants of the lessee are not his servants. He cannot control them. He cannot give them orders which they are bound to obey. They owe no allegiance or service to him. Having no power over them, and having conferred no authority upon them, he is not responsible for their acts. He stands in no relation to them which makes applicable to him the maxim *respondeat superior*.

The application of these principles, under the adjudged cases, is generally not difficult, when the facts are undisputed. Thus, in *Blake* v. *Ferris*, (1 *Seldon*, 48,) the defendant had a license from the common council of New York, to put down a sewer in one of the public streets, and which required him, in order to protect the citizens from danger, to keep up

proper barriers and lights in the neighborhood of the excavation, and made him responsible for the damages which might result from the making of the improvement, by a neglect of any of the necessary precautions, and Ferris, instead of prosecuting the work himself, contracted with one Gibbons to do it, for a stipulated price, and it was done by the latter. During its prosecution, an injury occurred to the carriage and horses of the plaintiff, by their being driven into the excavation thus made; and for this injury the action was brought. But although there was a recovery, with the sanction of the supreme court, it was reversed in the court of appeals, and a lengthy opinion pronounced, in which this whole doctrine is elaborately discussed and deliberately settled. The court distinctly held that Gibbons, and not Ferris, was the party liable, and that the servants of Gibbons were not the servants of Ferris, within the meaning of the rule *respondeat superior*. The decision is worthy of particular consideration, because, within the principle of some other adjudged cases, it might with much plausibility be contended, that inasmuch as the building of sewers and the duty of taking all proper precautions against accidents, were obligations resting upon the municipal authorities of New York, as public officers, imposed by law, and which they could not evade or shift upon others, they themselves should be regarded as the parties really liable; and inasmuch as they had substituted in their place the defendant, and expressly imposed upon him, by the terms of the written license, the same obligations and responsibilities which rested upon them, he should not be permitted to shift them upon another person. Nevertheless, the court of appeals emphatically hold that Gibbons being the actual contractor, and conducting the work by his own servants and means, for a stipulated price, to be paid him by Ferris, the latter was neither in a situation to interfere with, nor to be responsible for, the acts of the latter, so far as third persons were concerned. The principle of that case, unless it has been in some way

modified or overruled, is directly applicable to the case at bar, and decisive of the result.

Nor do I perceive any solid distinction in principle between this case and that of *Heimstreet* v. *Howland*, (5 *Denio*, 68.) That was, like this, an action on the case, for negligence alleged to have been committed by the ferryman of the defendant, by which a span of horses belonging to the plaintiff was drowned. There, as here, the defendant was the original lessee of the ferry. There, as here, he had leased the same to a third person, and the servant of the latter was guilty of the negligence. The question turned, it is true, upon the point whether the nature of the arrangement as to the ferriage, between the defendant and his lessee, did not constitute them partners, and the court held it did not, and therefore granted a new trial, reversing the decision made at the circuit. But if the ground which the plaintiff here takes was tenable, it would have been decisive of the case there. It is true, it does not seem to have been discussed, but it was necessarily involved in the case, and would have been fatal to the defendant, independent of the question of partnership.

The same principle was involved in the case of *Pack* v. *The Mayor &c. of New York*, (4 *Selden*, 222.) The defendants had made with one Foster a contract for grading and keeping in repair the Bloomingdale road, and Foster's servant in executing the work had blasted rocks, pieces of which were in consequence thrown into the second story of the plaintiff's house, injuring his property, and his wife and children, for which injury the action was brought. It was held that the contractor was not, in respect to liability for such an injury, the servant or agent of the corporation, and accordingly the court of appeals reversed the judgment of the court of common pleas of New York, allowing a recovery in such a case.

The principle was again enunciated in *Kelly* v. *The Mayor of New York*, (1 *Kernan*, 432,) where it was held that the corporation of the city of New York, which had ordered a street to be graded and had contracted with a person to do the

grading, was not liable for an injury to the plaintiff's horse, alleged to have been caused by the negligence, in the blasting of rocks, of the workmen employed by the contractor in performing the work; even though the contract contained a clause that the whole work should be done under the direction and to the entire satisfaction of certain of the officers of the corporation.

There is a class of cases where the original party is held liable, upon a different principle. Such is the case of *Bailey and others* v. *The Mayor &c. of New York*, (3 *Hill*, 531, 2 *Denio*, 433.) The action was brought for injuries to the plaintiff's lands and property, occasioned by the negligent construction of a dam upon property owned by the defendants, erected in the process of carrying the water of the Croton river to the city of New York, which was authorized by an act of the legislature for the purpose of supplying the city of New York with pure and wholesome water. The general superintendence and conduct of the work had been confided to certain water commissioners appointed by an act of the legislature, and they had contracted with other parties to build the particular dam in question, which parties by themselves and their servants had accordingly done the work. But the act of the legislature which originally authorized the work and appointed the water commissioners, had under a provision of the act itself, been submitted to the suffrages of the electors of the city for their approval and been approved by them; and this, it was held, was an adoption of the water commissioners as the agents of the city; and the work, when completed under the direction of the water commissioners, had been submitted to the common council of New York for approval and had been approved by them; and this, it was held, was an adoption of the work itself. The question however remained, whether the defendants were liable notwithstanding the injury happened by the negligent execution of the work by the contractors and their servants. And it was held, though with considerable hesitation and after a severe conflict, and

against an able dissenting opinion of Lieutenant Governor Gardiner in the court for the correction of errors, that they were so liable. And it was put mainly upon the ground that the defendants were the owners of the property upon which the dam that occasioned the injury was built, and that the dam was itself a nuisance, and that the defendants by sustaining and continuing the nuisance were in effect the authors of the injury; and that it was an incidental obligation attached to the ownership of real estate that it should not be made the instrument of damage to others.

To the same class belongs the case of *Congreve* v. *Morgan*, (5 *Duer*, 495.) That was a special action on the case for an injury happening to the plaintiff by his being precipitated into a vault under a side walk in the city of New York, in consequence of a defective flag stone used as a cover to the vault or area beneath. The action was against the owner of the adjoining premises, for whose benefit the vault was constructed by a contractor employed for that purpose. The plaintiff had a verdict, which was sustained on a review at general term. The decision was put upon three grounds: 1. That the erection of the vault was *unlawful* without the permission of the municipal authority. 2. That being constructed and maintained for the benefit of the adjacent real estate and its owner, it was incumbent upon him to keep it in proper condition and repair. 3. That having been delivered over by the contractor to the owner, and accepted and approved by him, the acceptance and continuance thereof by him must of necessity make him responsible for all injuries sustained during the period that he was in the possession and enjoyment of it. (*See also, as to the last point, Mayor of Albany* v. *Cunliff*, 2 *Comst.* 174.) So also in *Ellis* v. *The Sheffield Gas Consuming Company*, (22 *Eng. L. and Eq. Rep.* 198,) the defendants were held liable for an injury happening to the plaintiff by his falling over a heap of stones and dirt collected in digging a trench on a public street, notwithstanding the excavation was made by persons contracting with the defendants to do the work. And the de-

cision was put upon the ground that the act of digging up the streets was in itself an unlawful and unjustifiable act, and that the defendants, in employing a contractor to perform an act thus unlawful, were necessarily responsible, as they must be held to have directly authorized the excavation which resulted in the injury to the plaintiff.

The decision in *Congreve* v. *Morgan* may be successfully defended, also, by the reasoning that governed the court in *Dygert* v. *Schenck*, (23 *Wend.* 446,) where the defendant for his own convenience had built a raceway for the passage of water across the public highway, and had covered it with a bridge, which, after the lapse of ten years, becoming out of repair, the plaintiff's horse fell through and was injured. The action was sustained, the court regarding the building of the raceway as not only unauthorized but essentially a nuisance, and being maintained solely for the defendant's accommodation, and against the public rights and interests, he was bound to see to it that it was kept in perfect repair, or be responsible for the consequences.

The case of *Nelson* v. *The Vermont and Canada Rail Road Company*, (26 *Verm. Rep.* 717,) on which the plaintiffs' counsel relies as decisive of the present case, stands upon a different principle. It is this. Where the injury occurs from the nonperformance of a duty which the law imposes, and is directly traceable to that cause, there the party is liable notwithstanding subsequent parties or lessees taking his place may have been guilty of a like delinquency. In the case referred to, the injury occurred from the omission to make and maintain fences along the line of the rail road, the making and maintenance of which were made obligatory upon the defendants by their charter, the statute law of the state. The court properly held that notwithstanding the defendants had leased their road, and it was actually operated by other parties, the defendants were liable for an injury which resulted from their omission to comply with a duty imposed by the very terms of their charter, and which was none the less obligatory on ac-

count of the lapse of time during which their delinquency had been continued.

The case of *Hutson and wife* v. *The Mayor &c. of New York*, (5 *Selden*, 163,) rested upon a like reason. An injury happened to the plaintiff's wife from driving into an excavation made under the permission and authority of the defendants, by the Harlem Rail Road Company, in one of the New York avenues, for the convenience and accommodation of their road. The plaintiffs recovered, upon the ground that the superintendence and repair of the public streets and avenues of the city were duties imposed upon the defendants by law, for executing which they were provided with ample means, and from which they could not discharge themselves by any arrangement with other persons.

So also where an act is forbidden by statute and originally unlawful, and the injury complained of can be said to be a direct, natural and necessary consequence of the unlawful act, the party doing that act must be held responsible. It was upon that principle that the case of *Thomas* v. *Winchester*, (2 *Selden*, 397,) was decided by our court of appeals, in which the defendant, who had by mistake put a false label upon a box of medicine, in consequence of which an active poison was sold for a harmless article, was held liable, notwithstanding the medicine had gone through several intervening hands before it reached the plaintiff; and notwithstanding the defendant had not sold it with any view of its being administered to the particular party who actually suffered from its poisonous qualities.

From this review of the leading cases it will be seen that none of them, with perhaps a single exception, rest on grounds which will sustain the plaintiff's recovery. Some of them point prominently to the fact that the act originally done or authorized was *illegal;* and doubtless where this is so, and the injury complained of can be deduced as a direct and necessary consequence from such an act, the original party should be held liable. Such are the cases of *Dygert* v. *Schenck*, *Congreve* v. *Morgan*, *Hutson* v. *The Mayor &c. of New York*,

Nelson v. *The Vermont and Canada Rail Road Company*, and *Thomas* v. *Winchester*, above referred to. And yet all those cases are plainly distinguishable from the case at bar, even if we assume that the lease from Wiswall to Morrison was an unauthorized or illegal assignment. The distinction consists in this: that the negligence of Morrison's servant is not a direct and natural consequence flowing from the lease of Wiswall to Morrison, because it must be assumed that either by the express terms of that lease, or by legal implication, it was made the duty of Morrison to provide proper boats and skillful men, and to transport passengers with all necessary skill and care. The case of *Ellis* v. *The Sheffield Gas Consuming Company* seems to go farther than any of the other cases above referred to, and to hold that where the act—for example, the excavation in the street for the purpose of laying down gas pipes—was unlawful in itself, then an injury which arose from a heap of dirt thrown out by the excavation would make the gas company liable notwithstanding the work was done through a *contractor* employed by them, and the injury occurred by the *negligence* of the contractor's servants. That case is not quite analogous to the present, even if we assume the lease to be unlawful, because in the English case the entire proceeding was illegal, whereas in this case Wiswall had the right of ferriage and the right to employ Morrison to conduct it as his servant; and the illegality, if any, was in undertaking to invest him with his rights by lease or assignment.

But the English case above referred to seems to be in conflict with the American cases, and, I think, with the spirit of the cases in our own state. Two of them are referred to in the able opinion of Mr. Justice Harris in the parallel case of *Blackwell* v. *Wiswall*, arising out of the same transaction, where the question was presented on demurrer. These are the cases of *Ladd* v. *Chotard*, (1 *Alab. Rep.* 366,) and *Felton* v. *Dean*, (22 *Verm. Rep.* 170,) where the defendant who had a ferry license, receiving the same under similar restrictions to those imposed by our own laws, having *rented* the same to

another party, by the negligence of whose servant the injury occurred, was held not to be liable in a suit by the aggrieved party. These cases are nearly or quite parallel to the present. To these may be added the case of *Bowyer* v. *Anderson*, (2 *Leigh's Va. Rep.* 550,) which was similar to the last two cases above cited, except that the defendant's agreement with a third party left it equivocal whether it was a partnership or a transfer for the time being of the absolute interest of the defendant as the licensee of the ferry. This was, as in the case of *Heimstreet* v. *Howland*, (5 *Denio*, 48,) the only question discussed; it never having, seemingly, occurred to either counsel to take the ground that the original party was liable whether he had assigned or leased his interest or not.

The weight of authority seems decidedly against the plaintiff's right to maintain the action against the present defendants. I think it therefore unnecessary to discuss the question whether the lease or renting by Wiswall to Morrison was an unlawful and ineffectual attempt to vest in the latter rights which were confided to Wiswall as a personal trust and confidence, and in their nature not assignable. I incline to the opinion of Mr. Justice Harris on that point; but I concur with him also in the conclusion that assuming such to be the fact, it cannot make the servant of Morrison whom he had no right to direct or control, in whose selection he had no agency, and of whose conduct he had no knowledge, his servant in the sense which should make him liable for the consequences of his wrongful and negligent acts, under the rule *respondeat superior*.

The decision of this question against the plaintiff makes it unnecessary to examine the other questions made at the trial.

The judgment should be reversed and a new trial granted, with costs to abide the event.

WRIGHT, J., concurred. GOULD, J., dissented.

Judgment reversed.

[ALBANY GENERAL TERM, March 1, 1858. *Wright, Gould* and *Hogeboom*, Justices.]

26 630
29 408
37 57
33h 608
23a 61

BISSELL and PERKINS, ex'rs &c., *vs.* THE NEW YORK CENTRAL RAIL ROAD COMPANY.

To constitute a strip of land, laid out as a street, by the proprietor of a tract of land, a public highway, by force of a *dedication* for that purpose, the dedication must be *accepted* by the proper public authorities, or there must be a *user* of the strip as a highway.

The mere surveying, mapping and laying out of the tract, opening the street and selling lots upon it, does not make such street a public highway.

These acts are evidence of an intention to make a dedication. They import an incipient dedication, by the owner of the fee, of the strip to the public. But until the proprietor has sold the lots, or some of them, he can recall the proposed dedication; and on extinguishing the claims of any grantees to whom he may have sold lots, he can revoke the dedication at any time before the public has acquired affirmative rights by the adoption of the proposed street by some express corporate or official act, or by *user* distinct and unequivocal, of such street as a public road or highway.

Express acceptance by the public authorities is not requisite; nor user for a length of time sufficient to create a title by prescription. User for a short time, express and unequivocal, treating the strip of land as a street or highway, is sufficient.

EJECTMENT to recover possession of a strip of land, 60 feet by 190, in the city of Rochester, in part occupied by the warehouse of the defendants, and the residue by their road tracks. There was no dispute that William W. Mumford, the plaintiff's testator, prior to 1830 owned this land. Wm. W. Mumford died in 1848. The title of the defendants, who claimed the premises in fee, depends upon the following facts: In 1826 or 1827, Mumford, being the owner of a considerable tract, embracing the premises in dispute, employed Elisha Johnson to make a survey and map of the tract, laying it out into village lots, which he did and delivered the map to Mumford. On this map the lands in controversy are laid down as "Erie street," running east from Kent street, which formed the western boundary of the Mumford tract. Erie street, on that map, has adjoining it on the south side, lots 1, 2, 4, 5 and 6, in section G, and on the north side, lots 13, 14, 15, 16, 17 and 18, in section D. No size of lots is given on the map, but only lines and numbers. Mumford, between 1828 and

1845, conveyed to different individuals, *all the lots on either side of Erie street*, describing them invariably by their numbers, "reference being had to the allotment and survey made by Elisha Johnson." In some cases the size of the lot was given, as follows: "being 33 feet front and rear, and 99 feet deep." No express mention was made in any of his deeds of any street. Mumford placed that map, or a copy of it, in the hands of agents engaged in selling his lots, and they made sales in reference to it. Through various mesne conveyances, the defendants, prior to the commencement of this suit, had obtained the title to all those lots. Many of the deeds subsequent to Mumford's, describe the lots as bounded on Erie street. As many as 30 years ago, there were houses on both sides of Erie street; and from that time down to 1848, or later, the occupants of the lots used that street for access to them. Erie street was laid down on Johnson's map across the entire block, from Kent street to Jones street. But as Mumford owned only half the distance, he had no power to dedicate the other half as a street, and it seems never to have been opened through to Jones street, except for a short time. The common council adopted Erie street, as far as it was laid down by Mumford on his land, and at one time proposed continuing it the residue of the distance to Jones street; but finally in March, 1845, abandoned the attempt. At what time that part of Erie street, which was on the land originally owned by Mumford, was closed up, does not appear; but it is now all occupied by the defendants, and one of their buildings covers nearly the whole entrance into it from Kent street. On these facts, the judge on the trial directed a verdict for the plaintiffs, and gave the defendants 60 days to make a case or bill of exceptions, to be heard in the first instance at a general term, with leave to either party to turn it, if a case, into a bill of exceptions.

S. Mathews, for the plaintiff.

H. R. Selden, for the defendants.

By the Court, E. DARWIN SMITH, J. No exceptions having been taken to any decision of the judge upon any question of law, and no request made to him to submit the case to the jury upon any question of fact, his direction to them to find a verdict for the plaintiff cannot be matter of objection or exception here. The questions now presented to the court should therefore be considered as upon a case without exceptions. If we can see upon the whole case that the verdict for the plaintiff was not warranted by the law or the evidence, it will be our duty to order a new trial. What the jury would have been bound to find upon the evidence we must assume to be true, and proved, for the purposes of the examination of the case which the court is now called upon to make. It should be assumed, therefore, I think, that William W. Mumford, the plaintiff's testator, was seised in fee of the premises in question, at the time of his death, unless his title was divested by the dedication thereof to the public, as claimed by the defendants. It appears that Mumford owned one half of a block of ground situated in the city of Rochester, surrounded on all sides by streets open and used as public highways; that he projected the plan of opening a new street through the center of this block of ground, cutting his own land in the center and the land of the adjoining owners also in the center; that he proceeded to map and plot his portion of the block, and in his plot or map laid out such proposed street across his own and the adjoining land; that his portion of such block was laid out into city lots on each side of such proposed street, and fronting thereon; that he proceeded to sell, and did sell, all of such lots by their numbers on said plot, but without any distinct mention of, or reference to, such proposed street by name; that his grantees entered upon such lots and built thereon, and the strip designated as a street was used by them for access to their lots, and was opened so far as Mumford's land extended but never was opened through the other half of such block. It does not appear that the owner of the other half of such block ever plotted his ground into city lots, or

ever in any way assented to the opening of a street through the same, and a fence was kept up by him on the line of division between his portion of such block and that of Mumford. The defendants have acquired all the rights of the grantees of the several lots, and occupy the same and the strip designated as a street on Mumford's plot and survey. There can be no question, I think, on the facts of the case, that Mumford did all that he deemed requisite to dedicate this strip of ground, called Erie street, to the public, and intended such dedication. He opened it of the requisite width for a street, and sold the lots upon it in the customary way in which proprietors of tracts of land in cities open streets for the purpose of cutting up their land into small lots and selling the same to separate owners. His grantees acquired the right to have the strip remain open for the purpose of a street and to be free from any tax or assessment for the fee thereof when the same should be adopted, opened or occupied by the city for the use of the public. By the sale of the lots nothing passed to the several grantees but this right and a perpetual easement over this ground, of egress to and from their lots. The fee did not pass to them by a simple conveyance of the lots by metes and bounds or by their numbers. But if this strip of land had become a public street, then I suppose the inference of law would be that the fee thereof was vested in the owner of the adjoining soil. That is the legal presumption in favor of the owner of lands bounded on a public highway or upon a private stream. This at least is the assumption upon which the defendants rest; claiming that this strip of land had become a public street, and that having acquired the rights of all the private owners of property bounded thereon, they had a right to extinguish the easement and appropriate the property to their own private use as against all persons but the city.

The inquiry then is, whether this strip of land, called Erie street, ever became a public street or highway. And this is the only real point in the cause, as the case is presented to the

court.' I think this strip of ground was not a public highway, within the principle decided in *Holdane* v. *The Trustees of the Village of Cold Spring*, (23 *Barb.* 103.) But independently of that case, I think it was not a *highway*, upon well settled principles. In *The City of Oswego* v. *The Oswego Canal Co.*, (2 *Selden*, 264,) Judge Ruggles, giving the opinion of the court of appeals, says, "Streets or roads dedicated by individuals to public use, but not adopted by the public local authorities, or declared highways by statute, are not *highways* within the meaning of the highway acts, and *there is no law by which* any one can be compelled to keep them in repair." Judge Edmonds, in the same case, says there was nothing in the case to show that the streets in question were public highways. "All there was," he says, "upon the subject is, that the owners of the land laid it out in lots, bounding them on those streets. This did not make them streets or public highways." This is really all that has been done in the case before us, and this case in *Selden* is precisely in point on that question. The dedication proposed by Mumford was never consummated. It was initiate in effect—a mere proposition to give the land for a street, as respects the public. The proposed dedication must be *accepted*, to constitute a strip of land laid out as a street by a proprietor of a tract of land a public highway. The mere surveying, mapping, opening and laying it out and selling lots upon the proposed street, does not make it a *public highway*. These acts are evidence of an intention to make a dedication. They import an incipient dedication by the owner of the fee, of the strip to the public. But until a proprietor in such a case had sold the lots, or some of them, he could recall the proposed dedication, and on extinguishing the claims of any grantees to whom he may have sold lots, he could revoke the dedication at any time before the public had acquired affirmative rights by the adoption of the proposed street, by some *express corporate or official act*, or by *user, distinct and unequivocal*, of such street as a public road or highway.

I agree with Judge Wright in the case of *Clements* v. *The Village of West Troy*, (10 *Howard*, 208,) that there had been a sufficient acceptance of the alley in that case; that *express* acceptance by the public authorities is not requisite, nor user for a length of time sufficient to create a title by prescription. But there must be either an *acceptance* or *user*. User for a short time, express and unequivocal, treating the strip of land as a street or a highway, is sufficient. In *Jarvis* v. *Dean*, (3 *Bing.* 447,) where a street had been used four or five years as a public road, with the assent of the owner of the soil, a dedication was presumed. And in *The City of Cincinnati* v. *White*, (6 *Peters*, 431,) Judge Thompson says, "The user in such a case ought to be for such a length of time that the public accommodation, and private rights, might be materially affected by an interruption of the enjoyment."

I think the case was rightly disposed of at the circuit, and that a new trial should be denied.

New trial denied.

[Monroe General Term, March 1, 1858. *Johnson*, *Welles* and *Smith*, Justices.]

Boughton and others *vs.* Smith & Munger.

Judgment creditors, whose executions have been returned unsatisfied, are not entitled to the benefit of a suit commenced by the judgment debtor against a third party, to set aside various contracts and conveyances on the ground of usury.

They therefore cannot have an injunction, to restrain the judgment debtor from settling or compromising the suits so commenced by him.

The right of action to cancel or avoid notes, bills, securities or other contracts, on the ground of usury, or to have the same surrendered, is not assignable. If the party injured will not sue, or will not continue to prosecute, there is no right of action available to any person, or in any court.

MOTION to dissolve an injunction. The motion was ordered by the judge at special term, to stand over to and be heard at, the general term. The defendant, John W.

Smith, had commenced a suit against Lyman Munger, to set aside various conveyances, chattel mortgages and other securities, on the ground of usury, and to have the same canceled. The plaintiffs in this suit are judgment creditors of Smith, and on the return of executions unsatisfied, commenced this suit to obtain the benefit of Smith's suit against Munger, setting up that such suit was commenced by their procurement and at their expense, and that Smith was threatening to settle the same with Munger; and they obtained an injunction to restrain such settlement of the suit, and prayed leave to prosecute the suit in Smith's name. The defendant moved to dissolve this injunction. The facts sufficiently appear in the opinion.

S. Boughton, for the plaintiffs.

Wm. S. Bishop, for the defendants.

By the Court, E. Darwin Smith, J. It is claimed by the defendants' counsel that there is no equity in the plaintiffs' case as stated in their complaint, and that they can have no relief thereupon, in a court of equity; and therefore that the injunction granted upon the commencement of the action should be dissolved. The plaintiffs are judgment creditors of the defendant Smith, with executions returned unsatisfied, and were therefore entitled to commence a suit in equity to reach the equitable property of their judgment debtor, and so far as their complaint is adapted to reach such property it may, obviously, be sustained. But the injunction was not allowed as upon a creditor's bill, and is not in the form usual in such cases, and cannot be sustained as a creditor's injunction as upon a suit on the return of an execution unsatisfied. The injunction simply restrains the defendants from settling or compromising, or attempting to settle or compromise, in any manner, the action described in the complaint wherein the defendant Smith is plaintiff and the defendant Munger is

the defendant. As the questions involved in the decision of this motion affect and will probably dispose of the whole merits of the action, I think it proper to consider and discuss them as though they had been raised upon demurrer to the whole complaint, for want of equity. The bill in this action is filed apparently for the sole object to obtain the benefit of the former suit, pending between the defendants and referred to in the injunction. The action of Smith against Munger, it appears, was commenced to avoid certain bonds and mortgages, conveyances, bills of sale and chattel mortgages, and to reach and require to be given up certain promissory notes turned out by Smith to Munger—all given and turned out to secure a loan or advance of money upon a usurious agreement. In the original action of Smith against Munger, the complaint sets up a clear cause of action to avoid the several contracts and conveyances therein set out, upon the ground of usury. If that suit were prosecuted to a decree and the plaintiff established the facts alleged, he would be entitled to the relief prayed for, under the provisions of the revised statutes regulating the interest upon money, as the same were revised by the act of 1837, on the same subject. The plaintiffs do not seek, and are clearly not entitled, to sustain this action, as original parties to the usurious transaction, as principals, sureties or otherwise. They seek to avail themselves of the suit instituted by Smith and to claim the benefit thereof, and the right to prosecute it in his name for their own benefit, and that they may create a fund for the payment of their debts out of the property in the hands of Munger; and they claim that such suit was commenced by agreement between Smith and them, and for their benefit, and that they employed the attorney who instituted it, and have since assumed the whole responsibility of prosecuting it, and have indemnified Smith for all costs and expenses arising from the same. The plaintiffs' action assumes what is clearly the law, that the defense of usury, and the right to institute an affirmative action to avoid contracts tainted with usury, is a *personal*

privilege. (1 *Barb.* 278. 7 *Cowen*, 413. 10 *Wheat.* 367. 7 *Hill*, 391. 5 *Barb.* 133.) And the application for the injunction, and the allegations in the complaint, both also assume that Smith is not desirous of prosecuting his original action but is anxious or disposed to settle or compromise the same with Munger. It is apparent, therefore, that if this suit can be maintained a party may be compelled *ad invitum* in this court to insist upon the defense of usury, and that such a defense or affirmative claim based on such allegations of usury can be maintained by the creditors of the *borrower*, and against his wishes, in this court. Before the revised statutes, a party coming into a court of equity to asks its aid to avoid an usurious security, was required to pay, or to offer to pay, the amount actually loaned or advanced, upon the cardinal principle in equity, that "one who asks equity must do equity." The plaintiffs admit that Munger has made large advances to Smith, and that he holds the securities in question for a debt of $10,000, and which the defendant claims to be $16,000, and yet they do not offer to pay this sum, or any part thereof. Again; it was and is a fundamental doctrine of the courts of equity not to enforce, but to relieve against, a penalty or forfeiture. The plaintiffs ask this court to enforce upon the defendant Munger, a forfeiture of $10,000, according to their own statement of his advance for their benefit and that they may be enabled to obtain their debt of $4000. To do so, independently of the provisions of the statute, would be a subversion, most palpably, of the cardinal principles and doctrines of a court of equity. Upon received and recognized principles, no basis can be found in such a case to sustain such an action. It is repugnant to all its original maxims and axioms. But the legislature, in sec. 8, tit. 3, chap. 4, part 2 of the revised statutes, and by the act of 1837, chap. 430, sec. 4, have enforced it upon the court, in disregard of its original principles, to give relief against usurious contracts in certain cases without requiring the payment or a deposit of the principal sum or interest, or any portion thereof, as a

condition of granting such relief. The provisions of these statutes only apply in favor of the actual *borrower*, the original party to the loan, or to one representing him by privity of estate. (*Post* v. *Bank of Utica*, 7 *Hill*, 391. 3 *Barb. Ch. Rep.* 640. 2 *Comst.* 131. 4 *Kernan*, 131.) The plaintiffs stand in no such relation to Munger, and cannot, in their own right as creditors, maintain this action. Can they do so in Smith's name and avail themselves of his suit for that purpose, against his will? This is the only question that remains. The assent of Smith, or his agreement that the original suit should be commenced in his name for the benefit of the plaintiffs, and the acts and steps since taken in affirmance of such agreement, clearly imply, or are equivalent to, an equitable assignment of his cause of action. If the cause of action was a meritorious one, not affected by any question of usury or other statute offence, no doubt this court would maintain the rights of these plaintiffs and restrain Smith from doing any thing to their prejudice, in the prosecution of this suit. Assuming, then, that the plaintiffs are assignees of the rights of Smith, by an actual assignment of all his right to commence and prosecute the original action against Munger—and their rights can be no greater—can they then maintain the action? It seems to me very clear from the principles above stated, and the authorities referred to, that the right of action to cancel or avoid notes, bills, securities or other contracts, on the ground of usury, or to have the same surrendered, is not assignable. If the defense, or right of action, is limited to the *borrower* and his legal representatives, assignees cannot maintain it. They are clearly not included. It is a *statute* right of action. The offense of taking the usury is a misdemeanor. The right of recovering back, and to avoid all contracts tainted with the usury, is in the nature of a penalty, and a heavy penalty. It is within the principle of the case of *Weyburn* v. *White*, (22 *Barb.* 82.)

There is no equitable or legal interest to assign. The right of action rests in and upon the statute. The parties make a

corrupt and illegal agreement. Both agree to violate the statute, but the law deems it best to punish him who takes the usury, as the most efficient means to prevent the commission of the crime. It imposes upon him the loss of all he loans. This is a severe penalty. It is given to the person injured. It is a right of action or defense that only exists by virtue of the statute, and is by well settled rules of interpretation, limited to the party injured, and his legal representatives. He cannot assign it; he cannot allow another person to sue for it in his name. He cannot barter the right of action. The real party must appear upon the record, or some one bound to pay the debt in his stead, and demand the statute penalty. (11 *Wend.* 342.) If he will not sue, or will not continue to prosecute, there is no right of action available to any person, in any court. (2 *Hill*, 524. 11 *Barb.* 88. 13 *id.* 563. 5 *Seld.* 73.)

I cannot see any principle upon which this action can be maintained, so far as relates to the maintenance of the suit of *Smith* v. *Munger*.

The plaintiff is not entitled to the relief demanded in his complaint. This court cannot coerce the defendant Smith to prosecute a suit to avoid his own contracts on the ground of usury, and enforce a great loss on the defendant Munger, for the benefit of these complainants or otherwise. A court of equity cannot be used, in my opinion, for such a purpose.

The injunction should be dissolved, with $10 costs.

Injunction dissolved.

[Monroe General Term, March 1, 1853. *T. R. Strong, Johnson* and *Smith*, Justices.]

26 641
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29 611
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24a 181

WELLES *vs.* THE NEW YORK CENTRAL RAIL ROAD COMPANY.

Where an individual is traveling upon a rail road, by virtue of a free ticket which entitles or permits him to ride in the cars of the company at his own pleasure, the ticket having an indorsement on the back thereof by which he "assumes all risk of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents, or otherwise, for any injury to the person, or for any loss or injury to the property" of such passenger, and he suffers an injury to his person by means of a collision between the passenger train and a freight train left standing upon the track, the company is not liable therefor; this being a case of injury within the contemplation of the parties, and they having a *right* to stipulate for an exemption from liability under such circumstances.

Carriers of passengers are not obliged to carry any person without compensation, at their own risk. They have a right so far to restrict their liability, in such a case, as to contract with the passenger that he shall take his own risk, in respect to loss or damage from injuries resulting from mere negligence.

They may contract for exemption from loss arising from the negligence of their servants or agents; and where there is a special agreement to that effect, carriers are not liable for any injuries, except such as are the result of fraudulent, willful or reckless misconduct on their part, or on the part of their officers or agents.

What amounts to gross negligence, or such negligence as will imply fraud or bad faith on the part of the carriers.

APPEAL from a judgment entered at a special term, after a trial at the circuit. The action was brought to recover damages for an injury sustained by the plaintiff while riding on the cars of the defendants, under a special contract between the parties. By a stipulation between the attorneys for the respective parties, the following facts were agreed upon:

First. That on or about the 18th or 19th day of September, 1855, the defendants were a corporation, duly incorporated under the laws of the state of New York, and that their corporate name was and is "The New York Central Rail Road Company;" that, as such corporation, they were the owners and proprietors of the rail road from Albany to Buffalo, known as the New York Central Rail Road, and of the cars then running thereon, for the conveyance of passengers and freight respectively, as hereinafter mentioned. *Second.* That on said 18th or 19th of September, 1855, the plaintiff took passage at

Lyons for Albany, on one of the express passenger trains of the defendants, on said road, being a regular night express passenger train. *Third.* That while said plaintiff was seated in the forward passenger car of said train, on its way to Albany on said trip, and near or at a place called West Albany, and while said train was running at a high rate of speed, a collision occurred between said passenger train and certain cars of a freight or cattle train, standing on the same track of said road, by means whereof the body of the baggage car, on said passenger train, was driven backwards into the said forward passenger car, where the plaintiff was seated, as aforesaid, so as to strike said plaintiff upon the face and head, and that the plaintiff was thereby wounded, bruised and cut in the head and face, and that the damages of the plaintiff, in consequence of such wounds, bruises and cuts, amount to the sum of $750. *Fourth.* That such collision occurred, and such injuries to the person of the plaintiff were occasioned, through and by means of the carelessness and negligence of the defendants and their agents and servants in charge of said passenger train and of such freight or cattle train, at the time of such collision. *Fifth.* That when the plaintiff took passage as aforesaid, and when such collision occurred, and such injuries to his person were received as aforesaid, he the said plaintiff was riding as a passenger on, and as holder of a ticket theretofore delivered to him by the defendants, partly written and partly printed, of which the following is a copy, to wit: "FREE. New York Central Rail Road. Not transferable. Conductor will pass P. C. Wells, Dewey & Co. until Jany. 1, 1856, unless otherwise notified. (Signed) C. Vibbard, Supt." On the back of which ticket is printed as follows: "The person accepting this free ticket assumes all risk of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents, or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using this ticket. If presented by any other person than the individual named therein, the conductor will

take up this ticket. This pass is not to be presented or used by the holder to procure a pass over any other road."

The jury found a verdict in favor of the plaintiff, for $750, the sum agreed upon in the stipulation as his damages, besides costs. For which sum judgment was entered, and the defendants appealed.

E. H. Avery, for the appellants.

F. E. Cornwell, for the respondents.

E. DARWIN SMITH, J. In the conclusion of the judge at the circuit, that the plaintiff is entitled to recover in this action, I find myself unable to concur. The plaintiff received a free ticket from the defendants, entitling or permitting him to ride in their cars at his own pleasure, with an indorsement on his ticket by which "he expressly agreed that the company should not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to his person or for any loss or injury to his property." These were the terms and the conditions on which the defendants gave and the plaintiff received his ticket. It implies, in effect, an agreement on the part of the plaintiff to take the risk of all the casualties attending rail road travel, so far as they arose or might arise or result from negligence on the part of the officers and agents of the defendants. The defendants are a corporation, engaged in carrying persons and property as common carriers. They are necessarily obliged to carry on their business through the instrumentality of numerous officers and other agents. From the character of the business, the great liability to accidents or injuries to person and property resulting more or less in most cases from some degree of neglect or want of care on the part of some of their numerous employees, and the serious character of such injuries, the company might well desire to restrict their liability to damages from such casualties to the narrowest possible limit. In respect to persons

carried for hire, they could obviously do nothing to restrict their liability, or that should excuse them from the exercise of the utmost diligence and care. But they are not obliged to carry any person without compensation, at their own risk. They must have the clear right to contract with any such person that he must take his own risk. He would ride in the same cars with other passengers, and would be liable to the same and no greater accidents, but as he would pay nothing for his fare he might well agree to take his own risk. He knew that the company was liable to suffer great loss and damage from the negligence of its agents, and that it would naturally seek to avoid, or had a great interest in preventing, such loss by every reasonable precaution. But with the best of care, and the utmost caution, some accidents, he knew, would unavoidably occur from the unforeseen negligence, carelessness or want of skill of its employees. Against all such accidents, "*under any circumstances, whether of negligence by the agents of the defendants or otherwise, the plaintiff expressly agreed to assume and take his own risk.*" This is the *bargain.* It is not unlawful. It is distinctly and fairly made and clearly understood. I cannot see why it is not fully binding, to the extent of exempting the defendants from all loss or liability to loss or damage from injuries resulting from mere *negligence.* I do not see any ground to stop short of this exemption from loss or liability on the part of the defendants, within the entire range or scope of *negligence* not arising from bad faith or fraud. I see no ground to measure the *degrees* of negligence. The contract makes no degrees. It is sweeping, and includes all *negligence.* It makes no exception of gross negligence. The plaintiff and defendant both knew that there was a liability to accidents from *gross* as well as from slight negligence. They use the word negligence in its general legal sense, to embrace all accidents or injuries resulting from carelessness or mere *non-feasance* of the defendants' agents. Nothing else, it seems to me, will satisfy the fair meaning—the plain import—of the contract. The plaintiff's

injury resulted from a collision between the cars of the train in which he was riding as passenger, and some cars standing on the track. It was of course a case of negligence to have such a collision occur; but collisions do happen quite frequently, and that was well known to the plaintiff and to all the public. This cause of injury was most obviously within the contemplation of the parties, for it is the most fruitful cause of accidents and loss and injuries in rail road traveling. All collisions of trains must be the result of negligence in some degree, perhaps in the scale or degree of *gross negligence*. But with this ticket as his title and authority to ride in the defendants' cars, and as the contract on which the defendants agreed to carry him, I think the defendants are not liable for any injuries except such as were the result of fraudulent, willful or reckless misconduct on the part of the defendants' officers or agents. I put the exemption from liability from injuries resulting from negligence entirely upon the terms of the express agreement between the parties. If the plaintiff had been riding, at the time, gratuitously upon simply a free ticket, or upon the invitation of the defendants as matter of favor, courtesy or otherwise, the defendants would be liable. The cases of *The Philadelphia and Reading Rail Road Co.* v. *Derby*, (14 *How. U. S. Rep.*) and of *Steamboat New World* v. *King*, (16 *id.* 477,) and 5 *Indiana*, (*Porter*,) 340, fully establish the rule that the common law liability of a carrier applies in such cases to all injuries resulting from negligence. A common carrier, like other bailees for hire, may clearly limit his risk by express contract. Although long doubted, this is now distinctly settled. (*Dow* v. *New Jersey Steam Navigation Co.*, 1 *Kernan*, 490. *Alexander* v. *Green*, 7 *Hill*, 533. *Wells & Tucker* v. *The Steam Navigation Co.*, 4 *Selden*, 381. *Parsons* v. *Monteath*, 13 *Barb.* 360. *Alexander* v. *Greene*, 2 *Hill*, 20; 7 *id.* 533.) A carrier cannot contract for an exemption from losses arising from his own personal *fraud* or *gross negligence*. Such a contract would be *contra bonos mores*, and void. (13 *Barb.* 360. *Wells* v. *Steam Nav. Co.*,

4 *Selden*, 381.) But in the last case Judge Gardiner says, "Although the law will not suffer a man to claim immunity by contract against his own fraud, I know of no reason why this may not be done in reference to *fraud or felony committed by those in his employment.*" If this be so, certainly he may contract for exemption from loss arising from the *negligence* of his servants and agents. This is the precise distinction that I would make, and is the precise point upon which I cannot agree with the decision at the circuit. But the judge at the circuit put the liability of the defendants on the ground that the collision which caused the injuries was *prima facie gross neglect.* And he held that the defendants could not stipulate for exemption from liability for such neglect. The distinction between the several degrees of negligence is too nice and artificial for any clear definition or practical application. As Judge Curtiss remarks in 16 *Howard*, 477, "it may well be doubted if these terms can be usefully applied in practice." Judge Story also remarks, (*Story on Bailm.* § 11,) that "the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice;" and these distinctions are utterly repudiated by the late civil law writers. But if by gross neglect the circuit judge means such neglect as implies *fraud* or *bad faith* on the part of the defendants, I can agree with him in his conclusions, that for such negligence the defendants, in the same manner and upon the same principles with other bailees, would be liable; but I do not think the evidence warrants any such finding, as matter of fact. A bailee who is only liable for gross neglect is responsible only as a *naked depositary without reward*, which is the first class of bailments as classified by Sir Wm. Jones, (*Jones on Bailm.* 36;) and the defendants' liability, I think, falls within the rule applicable to this class. This class of bailees, he says, (p. 46,) "is only answerable for a *fraud* or for *gross neglect, which is considered evidence of it*, and not for such ordinary inattention as may be compatible with *good faith.*" If this *gross negligence* which is *evidence of fraud*,

can be rebutted by evidence that the depositary keeps his own goods of the same kind in a manner equally negligent, then he is not liable. (4 *Burr. R.* 2300. *Ld. Raym.* 655. 2 *Hawks, N. Car.* 145. *Edw. on Bailm.* 69, 70.) It is enough that the bailee keeps the property in the same manner as he does his own. (*Idem*, 72. 17 *Mass. Rep.* 479. *Foster* v. *Essex Bank, Id.* 498, 9.)

It seems to me very clear, that there is nothing in this case to warrant the finding that the defendants were guilty of such gross negligence as is equivalent to fraud, or *evidence* of fraud or bad faith. The plaintiff was riding in a car of a train which carried also the servants of the defendants, whose lives were in the same jeopardy with that of the plaintiff. A collision was likely to destroy much property of the defendants, and cause much loss of life besides the lives of their servants and agents, for which the company would be liable in heavy losses. There is and can be nothing in such a case upon which to base a charge of fraud or bad faith on the part of the defendants' agents or officers. There was not such gross negligence as implies *fraud or is evidence of it.* The defendants' officers and agents took the same care of the plaintiff that they did of themselves and of the property of the defendants and of the large number of passengers for whose safe passage they were bound to watch and guard with the strictest degree of diligence and care. In such a case I cannot think the defendants liable for the injuries sustained by the plaintiff; and the judgment of the special term ought to be reversed and a new trial granted; costs to abide the event.

JOHNSON, J., concurred.

T. R. STRONG, J., dissented.

Judgment reversed.

[MONROE GENERAL TERM, March 1, 1858. *Johnson, T. R. Strong* and *Smith*, Justices.]

26 648
20a 499

CAMPBELL and others *vs.* WOODWORTH and others.

The rule or measure of damages, in an action of trespass for taking personal property, is the actual cash market value of the property, at the time of the taking; to which interest may, generally, be added. Evidence to show for what sum the goods, at some subsequent time, were actually sold by the defendant, at public auction, is inadmissible.

MOTION by the defendants for a new trial, on a bill of exceptions, taken at the circuit, ordered to be heard in the first instance at the general term.

M. S. Newton, for the defendants.

S. Mathews, for the plaintiffs.

By the Court, WELLES, J. Action for the taking of a quantity of goods, being the property of the plaintiffs. At the trial before Mr. Justice STRONG, at the Monroe circuit in April, 1857, the defendants proved their title to the goods in question, by a deed of assignment from Timothy Chapman, dated August 10th, 1853, by which said Chapman assigned his property, including the goods in question, to the plaintiffs in trust, to sell and dispose of the goods so assigned, and with the proceeds to pay the debts due to his creditors, according to the order of preference therein designated. The plaintiffs then proved that the defendants, Woodworth and Pardee, seized and took the goods in question from the possession of the plaintiffs in a certain store in the city of Rochester, and removed them to another store in the same city, and afterwards sold them. The defendant Woodworth was, at the time, sheriff of Monroe county, and the defendant Pardee his under sheriff, and they claimed to seize the goods by virtue of executions issued upon judgments against Timothy Chapman, recovered subsequently to the assignment to the plaintiffs.

The plaintiffs proved by Robert L. Nicholas, that he had been a dry goods merchant eighteen years, and that he had

carried on business as such for several years in the city of Rochester, and was acquainted with such goods as were taken by the sheriff. That he took an inventory of the goods seized by the sheriff on the 22d day of October, 1853. That some of the black silks were worth what they cost. The colored silks were not worth what they cost, but were salable goods; that the prints were new and were worth their cost in New York; that all the goods were first class goods and the best of the stock. That the amount of the goods taken, according to the value as estimated by him, was $4884.29. This was the fair cash value. That he had arrived at the value by taking the cost price in New York, of such of the silk goods as were new, and as to the residue of the silks, by making such deduction from the cost price as in his judgment would bring them down to their fair cash value in Rochester. The domestic goods were estimated by him at their cost at the factory. Other witnesses were called by the plaintiffs to prove the value of the goods, by estimating them in the same manner. The defendants, on the cross-examination of the plaintiffs' witnesses, proved that the plaintiffs, as assignees of Timothy Chapman, kept the goods assigned and taken by the defendants, after assignment, in the store theretofore occupied by said Chapman. That they kept the store open after the assignment, and sold the goods at wholesale and retail, until they were seized by the sheriff on the executions.

The plaintiffs then proved the interest on the aggregate value of the goods as above stated, and rested.

The defendants then called Edwin Scrantom, who proved that he had for many years prior to the sale of the goods taken by the sheriff, been, and then was, an auctioneer in the city of Rochester; that he had been accustomed to sell goods, wares and merchandise of all kinds, at public auction, both for the sheriff and on private account, and whole stocks of goods, as well as small parcels, and as many goods for owners who sold for their own benefit, as for people who were obliged to sell, and that his sales were mostly forced sales; about

half of his sales of dry goods were forced sales. That he sold the goods taken by the sheriff, at public auction in the city of Rochester, for the sheriff; that the sale was in every respect fair; and that there were a great many bidders at the sale.

The defendants' counsel here proposed to prove the aggregate sum for which the said goods sold; 1st. As one of the means of arriving at their fair market value. 2d. As one of the proper means of arriving at their value in the hands of the plaintiffs, as assignees for the benefit of creditors, they being bound by law to sell them at public auction, or in some other speedy manner, and convert them into money. This testimony was objected to by the counsel for the plaintiffs, was excluded by the court, and the counsel for the defendants excepted to the decision. The court thereupon instructed the jury that the plaintiffs were entitled to recover the value of the goods as proved by the plaintiffs, with interest thereon from the time of their seizure. The jury thereupon found a verdict for the plaintiffs for $6051.14.

From this statement of the case, it appears that the only question for us to decide is whether the evidence thus offered by the defendants was properly excluded. It is the only question now raised by the defendants' counsel.

The rule or measure of damages, in an action of trespass for taking personal property, is the actual cash market value of the property at the time of the taking, to which interest may generally be added. Legitimate evidence of such value was given in this case, without objection. The evidence rejected was offered for the purpose of showing what the goods, at some subsequent time, actually sold for by the defendants, at public auction. This, I think, was inadmissible. The defendants could give no good title to the goods on their sale, and persons buying, if they were acquainted with the facts, must have known that they were liable to be purchasing litigation. This would be very likely to hinder their offering, or paying, the fair cash value of the goods. The case does not show what length of time intervened between the taking by

the sheriff, and the sale at auction by Scrantom, the auctioneer. If that time was considerable it might have made a difference in the market value. The process of removing them might have made some difference, as might also the place where they were sold.

Again, suppose they had been sold by Scrantom for very much more than their actual value; would the plaintiffs have been entitled to the excess? I apprehend not, in this form of action, as the actual value was all the plaintiffs had the right to ask.

The defendants were wrongdoers, and they took the property at their peril of paying their actual value, at least. The offer was not to show the actual value of the goods, at the time of the taking, either by opinions of witnesses or otherwise; nor what the plaintiffs might have sold them for, consistently with their duties as trustees for the creditors of Chapman; but what they, the defendants, sold them for, without the power to make any title to purchasers, and under circumstances, and by an auctioneer of their own appointment.

I think the evidence was properly excluded, and that a new trial should be denied.

Ordered accordingly.

[Monroe General Term, March 1, 1858. *Johnson*, *Welles* and *Smith*, Justices.]

Stephens *vs.* McNeill & Montgomery.

Where debtors, in the city of New York, being pressed by their creditor for payment, offered their certified check upon a bank in the city, at the same time proposing to the payee that it should be sent to Syracuse or Auburn to be cashed; and the check, dated one day ahead, was accepted by the creditor, upon that understanding, and was immediately sent to Auburn, where the cash was obtained upon it, and the check was returned to New York with due diligence and presented for payment at the bank upon which it

was drawn, which was refused, the bank having in the mean time failed; *Held* that the drawers were liable.

Held also, that it being a part of the arrangement that the check should be taken west to be cashed, the payee was entitled to a reasonable time for that purpose; and that all that was required of him was due diligence in getting it discounted, and having it forwarded to the city for demand of payment. That under the circumstances, the payee was not bound to present the check for payment on the day it bore date, or on the next day thereafter.

Where a check is negotiable by indorsement, and after having been indorsed by the payee and another person, is sued on by the payee, his possession of it, at the trial, is presumptive evidence that the check came to his hands by delivery from the owner, and is his property.

APPEAL from a judgment ordered at the Ontario circuit on a verdict.

F. N. Bangs, for the appellants.

Smith & Lapham, for the respondent.

By the Court, WELLES, J. On the 5th of December, 1854, the defendants, residing and carrying on business in the city of New York, were indebted to the plaintiff in the sum of over $1200. The plaintiff met the defendant McNeill in New York about nine o'clock in the forenoon of the same day, and told him he must have $1200 that day. McNeill replied that he should have the money if he would call at his office at half past two o'clock—and asked him if he wanted all the defendants owed him. The plaintiff said $1200 was all he wanted that day. The plaintiff accordingly went to McNeill's office at half past two and waited until after four o'clock, when McNeill came in and told the plaintiff he would have to disappoint him. He said he could not get the money. The plaintiff said he could not be disappointed. McNeill said the best he could do was to get a check. It appears that the plaintiff wanted the $1200 to hand to one Charles Peck to take to the western part of the state to pay on a hog contract which the plaintiff had made there. McNeill asked the plaintiff if he could use a check, to which the plaintiff replied he

could not. He then asked Peck the same question, and received the same answer from him. The plaintiff then said he could wait no longer, and left McNeill's office, leaving Peck there with McNeill. After the plaintiff had left the office, Peck told McNeill that if he could do no better he would try the check. McNeill then sat down and filled up a check, went out, and in a few minutes returned with a certified check drawn by the defendants W. H. McNeill & Co. on the Empire City Bank, payable to the plaintiff or order, for $1200, and dated the 6th of December, the day after it was given, and handed the check to Peck, who left New York that night, about five o'clock, by the Hudson River Rail Road cars, and came to Albany, where he was detained until the next morning in consequence of the cars not connecting. He left Albany at 7 o'clock in the morning and came on to Syracuse, where he tried to get the check discounted, but failed. He then came on to Port Byron, and in the morning of December 7th, sent a Mr. Smith with the check to Auburn, where Smith got the check discounted at the Auburn City Bank and received currency for it, and the same evening Smith handed the money, the proceeds of the check, to Peck at Port Byron. On the same day, the 7th of December, the cashier of the Auburn City Bank sent forward the check to the Mercantile Bank in the city of New York, by mail, for collection, where it was received between two and three o'clock in the afternoon of the 9th of the same month of December. On the same day the check was placed in the hands of a notary public, who went to the Empire City Bank, on the same day, in order to demand and receive payment, and found the bank closed, and no one in attendance to pay the check; whereupon the notary protested the check for non-payment and made a record thereof. At the time the check was discounted by the Auburn City Bank it was duly indorsed by the plaintiff and by Peck. On the afternoon of the 5th of December, when McNeill proposed letting Peck have a check, he said he had no money in the bank. When he asked Peck if he could not use a check and was told

by Peck that he could not, he said, "Can't you use a certified check at Syracuse or Auburn?" and in reply the plaintiff said he did not know but he could; that he would try, if he, McNeill, could do no better, and then the check was made, certified, and handed to Peck as before stated. Immediately after the check was protested it was returned by the Mercantile Bank to the Auburn City Bank. It appeared that the Empire City Bank failed and stopped business on the 9th of December, 1854, between two and three o'clock in the afternoon, and on the night of the same day its banking house caught fire, and afterwards its affairs passed into the hands of a receiver. There was evidence strongly tending to show that when McNeill applied to the Empire City Bank to get the check certified, it was understood that it was to be taken west and would not be presented at the bank short of three or four days, and that upon that consideration and McNeill's promise to make the defendants' account at the bank good the next morning, the check was certified. It also appeared that in the forenoon of the 6th of December the defendants made a general deposit in the Empire City Bank of $2000, and on the 8th another of $1104.78. There were a variety of other facts given in evidence, but none essentially changing the foregoing. After the evidence was closed, the counsel for the defendants moved for a nonsuit, on the following grounds, viz: 1. That it appeared by the testimony that the plaintiff was not the holder or owner of the check in suit. 2. That the defendants were not liable on the check, under the circumstances under which it was given. 3. That due diligence had not been used in presenting the check for payment. The court refused to grant the motion for a nonsuit, and the defendants' counsel excepted. The counsel for the defendants then requested the court to charge the jury: 1. That the giving and acceptance of the check in this case, certified by the bank, was a transfer of the funds of the drawer in the bank to the drawee or holder of the check, and that the funds of the drawer to the amount of the check were absolutely transferred. 2. That it was the duty of the

drawee or holder to present the check at the bank on the next day, or at least as early as the 7th of December for payment. 3. That the failure to present the check for payment, within that time, was negligence on the part of the drawee or holder, which discharged the drawer. 4. That the acceptance of the check by the bank operated as an assignment of so much of the funds of McNeill & Co. to the payment of the check, and it became the funds of the drawee. By taking the check and then neglecting to present it until after the bank failed, he assumed the responsibility of the bank, and was not entitled to recover. 5. There was no evidence in the case that McNeill made it a condition that Stephens should take the check into the country, or should not present it on the next day after it was given, or at least on the 7th or 8th; nor any evidence of an agreement or understanding between Stephens and McNeill to that effect, or which excused the presentation of the check on the 7th. The court decided not to charge in accordance with any or either of the propositions submitted by the counsel for the defendants, to which decision the defendants' counsel excepted. The judge then stated that as he viewed the case, it depended upon the question of diligence in the presentment of the check for payment. That it was the duty of the plaintiff to present the check for payment as early as the morning of December 7th, 1854, unless he was excused by an arrangement between the parties which authorized him to take the check into the country, and thus delay its presentment. That there was no conflict of evidence on this point, and no question of fact for the jury. The defendants' counsel then stated that he did not claim there was any question for the jury, but insisted, as matter of law, that the plaintiff had not shown due diligence in presenting the check. The court directed the jury to find a verdict for the plaintiff for the amount of the check and interest; to which direction the defendants' counsel excepted. The jury rendered a verdict for the plaintiff for $1365.27.

Under these circumstances we entertain no doubt of the

liability of the defendants to pay the check in question. They were indebted to the plaintiff, who was urgent for the money to send west to meet his engagements there. McNeill, one of the defendants, urged the check upon him, knowing it was not then equivalent to money, and suggested his taking or sending it west by Peck with a view of getting the cash for it at Syracuse or Auburn. It was in pursuance of that suggestion that it was taken, and no negligence is shown on the part of the plaintiff or the holders of the check in presenting it at the bank upon which it was drawn, provided he was at liberty to take it to Auburn. That he was so at liberty, the defendants should not be permitted to deny. The facts are quite as strong against them, on this point, as if they had expressly consented to the course that was taken. Indeed, they amount not only to such consent, but to a request that the plaintiff should take the very course with the check which he did take.

It is preposterous, under the facts proved, for the defendants now to contend that the plaintiff was bound to present the check for payment on the 6th of December, the day of its date, or on the day following. All that was incumbent upon him was to use reasonable diligence in his attempts to get it discounted at Syracuse or Auburn, and that it should go forward for demand of payment at the Empire City Bank by the established modes of conveyance; which the case shows has been done, without unreasonable delay.

There is no direct evidence that the check was ever re-transferred or assigned by the Auburn City Bank to the plaintiff, or that the latter ever purchased it of any one after it was discounted by that bank; and it was at the trial and is now contended that the plaintiff should have been nonsuited for that reason, the defendants contending that it does not appear that the plaintiff is the owner or has title to the demand for which the action is brought. To this it is a sufficient answer to say that the draft is negotiable, on its face, by indorsement. That it was indorsed by the payee and also by Peck, and the in-

dorsement of the latter being general, the check was transferable by delivery; and it being in the hands of the plaintiff at the trial, the presumption is, until rebutted, that it came to his hands by delivery from the owner, and is his property. A new trial should therefore be denied.

Ordered accordingly.

[Monroe General Term, March 1, 1858. *Johnson*, *Smith* and *Welles*, Justices.

Rochester and others *vs.* Barnes and others.

26 657
67 264
48 648
27a 485
25a 223

The act of May 13, 1845, "in relation to the contracts of rail road companies," had no application to rail road corporations formed under the general rail road acts of 1848 and 1850.

Accordingly, where a rail road company, created under the provisions of the general rail road act of 1848, contracted a debt, for cars, in 1853, *it was held* that the directors of the company could not be made personally liable for the debt, on the ground that the same was contracted by the agency, or with the assent, of the defendants, when the company had not available means for its payment.

The constitution of 1846 plainly designed to abolish the former mode, or system, of creating corporations, and to adopt an entire new system, under which, by general and uniform rules, the individual liability of corporators, for all debts of their respective corporations, should be regulated and prescribed.

And the legislature, in passing the acts of 1848 and 1850, intended to carry out this intention of the constitution, and by those acts to prescribe the *only* rule which should govern, as to corporations formed under them, and the individual liability of their respective corporators.

If the act of 1845 was not wholly repealed, by the acts of 1848 and 1850, its application and operation were, by plain and necessary implication, restricted and limited to corporations previously existing.

APPEAL from a judgment entered at a special term, upon the report of a referee. The action was brought to charge the defendants, who were directors of the Sacket's Harbor and Ellisburgh Rail Road Company, with a debt contracted by that company, for the purchase of rail road cars; on the

ground that the debt was contracted by the agency, or with the assent, of the defendants, when the company had not available means for its payment. The action is founded upon the provisions of the act in relation to the contracts of rail road companies, passed May 13, 1845. (*Laws of* 1845, *p.* 251.) (*a*) The cause was referred to Judge Gardiner, and tried before him in Feb. 1857. The referee decided that the defendants were liable for the debt, and ordered judgment accordingly. It appeared on the trial that the Sacket's Harbor and Ellisburgh Rail Road Company was incorporated on the 5th of March, 1849, under the general act authorizing the incorporation of rail road companies, passed in 1848. The defendants, with others, were directors of the company in 1853. In August, 1853, the company, through its directors, made a contract with Dutton, Rowe & Co. of Rochester, for the purchase of thirty cars for the use of the road, the price of which amounted in the aggregate to $17,000. The cars were soon after delivered, and the company gave its notes for the amount, payable in four, eight and twelve months. The plaintiffs claimed to be assignees of the demand. The copartnership of Dutton, Rowe & Co. was dissolved in September, 1854, and on the 18th April, 1855, Dutton, one of the firm and in the name of the firm, executed an assignment to the plaintiffs of the demand against the company, as well as the demand against the defendants arising upon the statute before referred to. The plaintiffs gave evidence on the trial tending to prove that at the time this debt was contracted the company had not avail-

(*a*) That act was as follows: "No debt or debts shall be contracted or incurred by or on behalf of any incorporated rail road company, beyond or exceeding its available means in its possession, under its control, and belonging to it, including its *bona fide* and available stock subscriptions, and exclusive of its real estate, at the time the same shall be contracted or incurred, to pay and discharge the same and all its debts previously contracted or incurred; and every officer, agent or stockholder of said company who shall knowingly assent to, or have any agency in contracting or incurring any debt, in violation of the provisions of this section, shall be personally and individually liable to pay such debt; and shall also be liable to arrest and imprisonment in any action for the same," &c.

able means to pay this debt, and the debts of the company previously contracted; and tending to prove, also, that the defendants, severally, assented to the contracting of the debt. Upon the last point the plaintiffs produced and proved a resolution of the board of directors, taken from the book of minutes, authorizing the treasurer to give the notes of the company for the price of the cars, payable at the several periods above mentioned. This resolution appeared to have been passed at a meeting of the directors held on the 17th of August, 1853.

The defendants appealed to the general term.

S. Mathews and *P. Gridley*, for the appellants.

Benedict & Martindale, for the respondent.

By the Court, JOHNSON, J. The important question upon the merits, in this case, is whether the act of 1845, (*Sess. Laws of* 1845, *p.* 257,) under which this action is brought, was, before its express repeal in 1854, applicable to corporations formed under the general rail road acts of 1848 and 1850.

The corporation, of which the defendants were officers and stockholders, was created under the provisions of the general rail road act of 1848, (*Sess. Laws of* 1848, *p.* 221,) and the indebtedness, for which this action is brought, was contracted in August, 1853. The referee who tried the action held that the acts of 1848 and 1850 did not repeal, or in any respect limit the operation of the act of 1845, but that the latter act remained in full force until its express repeal in 1854, and was applicable to the corporation in question, and to the defendants as officers, agents and stockholders thereof. If the learned referee, whose opinions are certainly entitled to great respect and consideration, is right in this, the judgment is, I think, correct, and should be affirmed.

But after a careful and deliberate examination of all these statutes and of the authorities, I have come to the conclusion

that the act of 1845 has no application to rail road corporations, formed under the general statutes, since the adoption of the present constitution. There may, perhaps, be some difficulty in establishing the proposition that the act of 1845 was repealed entirely, by implication, by the act of 1848, upon the ground that the two acts are so utterly repugnant that both cannot possibly stand for any purpose. Nor is it necessary to go this length. It is enough if it can be shown, satisfactorily, that it was intended that corporations created under these general statutes, and the stockholders therein, should be governed and rendered individually liable, by such statutes exclusively, and not by acts for the regulation of corporations previously existing, and differently created, and the payment and security of their indebtedness.

It appears perfectly clear and certain, to my mind, that it became not only the duty, under the constitution of 1846, but that it was the design and intention of the legislature, in enacting the statutes of 1848 and of 1850, to prescribe the only rule which should govern, on the subject of the individual liability of corporators of corporations formed under the provisions of those acts. And that consequently, if the act of 1845 was not wholly repealed, its application and operation were, by plain and necessary implication, restricted and limited to corporations previously existing. It was in effect repealed, as to corporations formed under the general law. This will be rendered quite apparent, I think, by reference to the provisions of the constitution of 1846, and of the two acts referred to. The constitution plainly designed to abolish the former mode, or system, of creating corporations, and to adopt an entire new system, under which, by general and uniform rules, the individual liability of corporators, for all debts of their respective corporations, should be regulated and prescribed. Hence article 8 of the constitution provides, that "corporations may be formed under general laws, but shall not be created by special act," except in certain specified cases. And by section 2 of this article it is provided, that "dues

from corporations shall be secured by such individual liability of the corporators, and other means as may be prescribed by law." Thus it will be seen that the whole subject of the act of 1845 is embraced in the provisions of the organic law, and a positive duty in reference to it enjoined upon the legislature. It evidently contemplates, and in effect directs, an entire revision of the laws, on the subject of the creation of corporations, and of the individual liability of stockholders for the dues of such corporations. It was in the discharge of this duty that the statutes of 1848 and of 1850 were enacted by the legislature. These acts create, and establish a new, entire and independent system, for the formation, action and government of the corporations formed under them. They confer and prescribe the powers such corporations shall possess and exercise, and the liabilities and forfeitures to which they shall be subject, and declare under what circumstances, and to what extent, stockholders therein shall be individually liable for all dues of such corporation, and for all labor and services performed for it, or upon its property. Under these circumstances, the fair and reasonable inference is, that the legislature intended to prescribe the only rule which should govern, as to these corporations, and the individual liability of their respective corporators. But this will appear still more clear and decisive, by referring to the language of these acts.

Section 12 of the act of 1848 declares that "all the stockholders of any such company that shall be *hereafter incorporated under this act*, shall be severally individually liable, to the creditors of such company," and prescribes under what circumstances, and to what extent, they shall be so liable. In like manner section 10 of the act of 1850 confines the individual liability of the stockholder to the creditors of the company, when it attaches to "the stockholders of any company formed under this act." The referee in his opinion treats these acts as though they had only made stockholders liable personally to workmen and employees of the company. It will be seen, however, that the provisions are much more extensive, and

embrace all debts and dues, of every description, contracted by the company. As a general rule, I think, when the legislature pass a particular act, and declare under what circumstances, and in what manner, and to what extent individuals shall be liable under that act, the intendment is, that they are liable under those provisions only, and do not fall within the provisions of former general acts. So subsequent general acts, although their language is sufficiently broad and comprehensive for such purpose, will not control the provisions of prior special statutes, unless the legislature so intended. (*Williams* v. *Prichard*, 4 *D. & E.* 2. *Dwarris*, 514.) The individual liability of stockholders, imposed by these acts, is not made applicable, at all, to corporations then existing. Section 49 of the act of 1850 makes several sections of the act applicable to all existing rail road corporations, but does not make sections 10 and 12, which relate to the subject of individual liability, so applicable; showing, as it seems to me, still more conclusively, the intention to make the individual liability provided for, apply exclusively to the new system, and to be the only rule of liability. Had these sections been made applicable to all rail road corporations then existing, I should have regarded the intent to repeal the act of 1845 entirely, as perfectly clear; especially when considered in connection with the constitutional provision before referred to.

Again; the grants of power in the acts of 1848 and 1850, are entirely inconsistent with, and repugnant to, the act of 1845. In addition to the general powers conferred upon corporations by title 3, chapter 18 of the first part of the revised statutes, the express power is conferred upon all corporations formed under these acts, to borrow money from time to time as may be necessary, for the purpose of constructing the road and operating it afterwards, without any of the restrictions, or any of the pains and penalties, prescribed in the act of 1845. (*Act of* 1848, § 19, *sub.* 10. *Act of* 1850, § 28, *sub.* 10.) Here is a general power granted to these corporations to contract debts by borrowing money upon their obligations respectively,

for the purpose of completing their tracks and fixtures, and purchasing all the stock and materials necessary for their equipment and operation. This necessarily includes the power to turn out their obligations directly to contractors who construct the roads, and to the manufacturers of engines and cars, who are willing to receive them in payment. To hold the contrary would be mere trifling with the enactments of the legislature. It would be absurd to suppose the legislature intended to compel such corporations to go through the process of borrowing money, and paying that only, in the construction of their roads and the purchase of their stock, if they could use their obligations directly for the same purpose, and to the same advantage. Such a distinction would be one of form merely, without sense or substance. It is true that the total or partial repeal of statutes, by implication, is not favored by courts. But it is also true that the doctrine of repeal by implication is as well settled and as firmly established as any known to the law. Mr. Sedgwick, in his recent valuable treatise on *statute and constitutional law*, states the rule very clearly as follows: "A subsequent statute which is clearly repugnant to a prior one, necessarily repeals the former, although it do not do so in terms; and even if the subsequent statute be not repugnant in all its provisions to a prior one; yet if the later statute was clearly intended to prescribe the only rule which should govern, in the case provided for, it repeals the original act." (*Sedg. on Stat. and Const. Law*, 124.) This rule is founded in good sense, and is not without the sanction of authority. (*Davis* v. *Fairbairn*, 3 *How.* 636. *Dexter and Limerick Plank Road Co.* v. *Allen*, 16 *Barb.* 15.) In *Pierce* v. *Delamater*, (1 *Comst.* 17,) it was held by the court of appeals that the abrogation of the constitution of 1821, and the adoption of the present constitution, repealed the statute which forbade the judge of any appellate court taking part in the decision of any cause which had been determined by him while sitting as a judge of any other court. (2 *R. S.* 275, § 3.) It has also been held, that a statute is impliedly repealed, by

a subsequent statute revising the whole subject matter of the first. (*Bartlett* v. *King*, 12 *Mass. Rep.* 537.) *Nichols* v. *Squire*, 5 *Pick.* 168.) The same rule also prevails where a statute revises the common law.

Applying these general principles to the case before us, I can entertain no doubt that the act of 1845 under which this action has been brought, was never operative against the corporation of which these defendants were stockholders, and officers, and imposed no obligations upon them, personally, to the plaintiffs or their assignors. The fact that the act of 1845 was expressly repealed by the legislature, in 1854, after the debt in question was contracted, furnishes, in my judgment, no argument in favor of the plaintiff's claim, and no evidence that such act was regarded by the legislature, even as being in force against corporations, and stockholders of corporations, under the general law. It may have been in force for some purposes as against prior corporations, and it may have been repealed expressly, for more abundant caution. Had the act of 1845 been in force against this corporation when the indebtedness in question was contracted, it is quite clear that its subsequent repeal would have formed no bar to the plaintiff's right of action. In that case the law would have imposed the obligation to pay upon the defendants, the moment the debt was contracted. It would have become their contract, and their obligation, immediately, by force of the statute. It would have been in no sense an inchoate obligation, but a complete and perfect one, to all intents and purposes, and the repeal of the statute afterwards could not have impaired it. But as the act was of no force against the defendants, no cause of action is established against them. The judgment must therefore be reversed and a new trial granted, with costs to abide the event.

[Monroe General Term, March 1, 1858. *Welles*, *Johnson* and *Smith*, Justices.]

INDEX.

A

ACTION.

1. An action brought to reach real estate which a testator devised to the defendant, and to have the same sold, for the purpose of satisfying a debt which the testator owed to the plaintiff, is an action *in rem*, for equitable relief, of which the supreme court had not jurisdiction previous to the code; and may therefore be commenced at any time within ten years after the cause of action accrued. *Wood* v. *Wood*, 356

2. The provisions of the code, relative to the time for commencing actions, do not apply to cases where the right of action accrued prior to the time the code took effect. *ib*

3. Where a municipal corporation had undertaken, by means of an assessment and sale, to create in themselves a certain term or interest in land, and assuming that they had succeeded in doing so, they sold such term or interest to the plaintiff, and it afterwards turned out that owing to a defect in the proceedings, no such term or interest was ever created; *Held* that an action would lie in favor of the plaintiff to recover back the consideration money paid by him; not on the ground of a failure of title, but because the thing he purchased never had an existence. *Gardner* v. *Mayor &c. of Troy*, 423

4. Under such circumstances, the parties being mutually mistaken as to the facts, although there be no fraud, the contract may be rescinded, on the ground that the subject of the contract had no existence. *ib*

5. Where W. commenced proceedings against S. under the mechanic's lien law, and recovered a judgment for the amount of his account, by default, without giving S. credit for the amount of a receipt and an order which S. had paid to him; *Held* that S. might maintain an action against W. to recover the amount so paid. *Smith* v. *Weeks*, 463

6. When W. received the money specified in his receipt, and when he drew the order upon S. and the same was accepted and paid, there was an implied agreement on his part that those sums should be credited upon his account against S. And in omitting to make the application, he was chargeable with a breach of good faith. *ib*

7. The right of action to cancel or avoid notes, bills, securities or other contracts, on the ground of usury, or to have the same surrendered, is not assignable. If the party injured will not sue, or will not continue to prosecute, there is no right of action available to any person, or in any court. *Boughton* v. *Smith*, 656

See MUNICIPAL CORPORATIONS, 1 2, 3.
PARTNERSHIP, 2.
RES ADJUDICATA.

ADMISSIONS.

See PARTNERSHIP, 4, 5.
WITNESS, 8.

ADVERSE POSSESSION.

1. In 1797, P. G. jun. entered into possession of a tract of timbered land, consisting of about 1500 acres, claiming title under a deed of conveyance, and lumber was cut in all parts of it, indiscriminately, for years, down to the year 1820, during which time about 300 acres of the tract was cleared. From 1820 to 1846 about 100 acres more were cleared. During all this time P. G. jun. resided in Albany. In 1801 his son H. G. took charge of the land as his agent, and so continued till 1812, when he and his brother took a lease of the premises. No portion of the lot had been designated as a wood or fencing timber lot, and no part, except the cleared portions, had been fenced. P. G. jun. and H. G. had paid the taxes on the whole tract. It was proved in relation to two adjacent tracts, that it was not the custom to inclose timber lands by a fence. Fire wood was cut by H. G. to send to his mother; and by some of the tenants, on the tract generally; but there was no proof that fuel or fencing timber had ever been taken from any particular portion. *Held*, in an action of ejectment for a portion of the tract, that the same had not been used for the supply of fuel or fencing timber for the purposes of husbandry, or the ordinary use of the occupant, within the meaning of the statute relative to adverse possession. (2 *R. S.* 222, § 10, *subd.* 3.) *Munro* v. *Merchant*, 383

2. *Held also*, that the case did not come within the 4th subdivision of the 10th section of the same statute which provides that where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved or cultivated. *ib*

3. Where there is no dispute in regard to the facts, the question whether a constructive adverse possession has been shown, is one of law, for the court to determine, and not for the jury. *ib*

4. The doctrine of submitting a case to the jury upon the presumption of a conveyance, for the purpose of upholding the possession, after a great lapse of time, does not apply to a case where the question is purely one of constructive adverse possession, founded upon an instrument in writing and an actual possession of a small portion of the land conveyed. *ib*

5. Where one enters into possession of premises under a conveyance giving him an estate for the life of another, and his estate ceases by the termination of that life, he then, being lawfully in possession, becomes the tenant by sufferance of the person entitled to the reversion, and cannot set up the defense of adverse possession, to an ejectment brought by one claiming title under a conveyance from the reversioner. *Learned* v. *Tallmadge*, 443

AGREEMENT.

1. An agreement to enter into a contract is fulfilled when the contract has been entered into by the parties, pursuant to the terms of the agreement. The original agreement being then *functus officio*, it cannot be made the basis of an action, in connection with the final contract. *Chesbrough* v. *The New York and Erie Rail Road Company*, 9

2. The repeal of the act of the legislature, prohibiting the circulation of bank notes of a denomination less than five dollars, repealed, also, the consequences of the act in respect to contracts entered into while it was in force. *Central Bank* v. *Empire Stone Dressing Company*, 23

3. Contracts made while the prohibitory law was in force, whose consideration was always morally good, as between the parties, are therefore now without the legal impediment of being contrary to legally established public policy, and are valid. *ib*

4. A foreign banking corporation is to be presumed to possess the power to enter into a contract with a borrower, to keep its notes in circulation, by redeeming them as they are

from time to time offered for redemption. *ib*

5. A contract for the delivery, at a future day, of an article to be thereafter manufactured, is not a contract for the sale of goods, within the statute of frauds, but for work and labor only. It need not, therefore, be in writing, signed by the party sought to be charged. *Donovan* v. *Willson*, 138

6. Where there had been mutual dealings between the defendants, who were manufacturers of churns, cultivators, &c., and W. & L., merchants, at O., in the course of which, work ordered from the defendants, by W. & L., had been from time to time applied on the account of the defendants; and on the 9th of February, 1855, W. & L., ordered from the defendants a quantity of churns and cultivators, to be manufactured and sent to them, agreeing to furnish the zinc necessary for their manufacture, which was accordingly sent to the defendants and charged in their account; *Held*, that although there was no *express* agreement that the churns and cultivators, when completed, should apply upon the defendants' account, an agreement to that effect would be *implied* from the circumstances; and that upon completing and offering to deliver the churns &c, to W. & L., the defendants were entitled to have the same credited to their account with W. & L., although the latter had in the meantime failed, and assigned their property to the plaintiff in trust for the benefit of creditors. *Myers* v. *Davis*, 367

7. *Held also*, that the price of the articles manufactured under this agreement became a debt against W. & L., which was a good set-off against their account, and formed a good defense to an action thereon, brought by the assignee of W. & L. *ib*

8. *Held further*, that the manufactory of the defendants being at a distance of 40 miles from the residence of W. & L., and the articles manufactured being of a bulky character, it was not necessary for the defendants to make a manual *tender* of the articles after a refusal to accept the same; that it was sufficient for them to notify W. & L. and the plaintiff that the articles were ready, and to offer to send so many thereof as would suffice to liquidate their indebtedness to W. & L. *ib*

9. Where a contract sought to be enforced springs out of a violation of the statutes of the state, the court will leave the parties to such contract where it finds them; withholding from both its aid in enforcing it. *Seneca County Bank* v. *Lamb*, 595

See ACTION, 6.
MORTGAGE, 7.
PLEADING, 1.

ALIEN.

1. Where, at the date of the treaty of 1794, between the United States and Great Britain, M., a British subject, was the owner of land in this state, by virtue of a conveyance executed in 1774, and he died, an alien; in 1802; *Held* that M. being alive at the date of the treaty, he and his heirs were entitled to be protected, under the 9th article of such treaty, notwithstanding they had no possession under their title; and that the son of M. although also an alien, could take the lands by descent from his father. *Munro* v. *Merchant*, 382

2. A child born in this state of alien parents, during its mother's temporary sojourn here, is a native born citizen. *ib*

3. The term "heirs or assigns," in the 9th article of the treaty of 1794, is not be confined to the immediate descendants of the alien, but is to be extended indefinitely till the title comes to a citizen. *ib*

APPEAL.

1. Where, after an execution has been issued and a levy made thereon, the defendant appeals from the judgment and gives security upon the appeal, the appeal will not have a retrospective effect, so as to discharge the lien created by the levy. *Matter of the petition of Berry*, 55

2. Whatever rights or liens are acquired by a levy are treated as if

they were vested rights, not to be superseded by personal security, but as suspended only until the decision of the appellate court. After the appeal is dismissed, the respondents are entitled to resume proceedings on their execution, and have priority over a subsequent execution. *ib*

3. Upon an appeal from an order or decree of a surrogate, all persons to whom sums are awarded by the surrogate, and who are therefore interested in sustaining his decree, should be made parties respondents, in the petition of appeal; although they were not parties to the proceedings before the surrogate. *Willcox* v. *Smith*, 316

4. The decision of a surrogate, awarding costs on the final settlement of the accounts of administrators, may be reviewed on appeal. *ib*

5. A devisee or legatee may appeal from an order of the surrogate, admitting a will to probate, notwithstanding he was one of the persons who presented the will to the surrogate, and petitioned for its probate. *Vandemark* v. *Vandemark*, 415

6. Where a referee, upon the facts proved before him, finds the law to be that the defendant is liable; to which finding no exception is taken, the defendant cannot, upon appeal, insist that he is not liable, upon the facts appearing before the referee. *Cheesbrough* v. *Agate*, 603

7. A case must be prepared, and settled by the referee, containing the exceptions taken during the trial, or afterwards; and if questions of law are not incorporated therein, they cannot be reviewed on appeal. *ib*

ARREST.

1. An action on the custom, against an innkeeper, for the loss of the baggage of his guest, is founded on tort. It is not for "injuring or for wrongfully taking, detaining or converting personal property;" but the gist of the action is tortious negligence in keeping the property. *People ex rel. Burroughs* v. *Willett*, 78

2. In such an action a defendant may be held to bail under the code, (§ 179, *sub.* 1,) when "he is not a resident of the state or is about to remove therefrom," it being "on a cause of action not arising on contract." When he has not been arrested before judgment, an execution cannot properly be issued against his body, (*Code*, § 288,) on the judgment, without an order of the court. *ib*

3. Such a judgment does not show a case for arrest, inasmuch as it does not show the non-residence of the defendant, or his intent to depart the state. *ib*

4. The regularity and propriety of such an arrest may be inquired into on *habeas corpus*. *ib*

5. A defendant so imprisoned should be discharged on *habeas corpus* if it appears that the process on which he is detained has been issued in a case not allowed by law, or where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law. *ib*

6. Where an arrest is rendered regular and lawful, in form, by the perjury of the plaintiff, he should not be permitted to derive any benefit from it. *Strong* v. *Grannis*, 122

7. Where a creditor residing in Canada, for the purpose of procuring the arrest of his debtor, a resident of this state, while temporarily in the former country, made an affidavit in which he swore that such debtor was about to leave Canada with the intent and design to defraud him of his debt; such creditor in fact having no reason to believe the fact stated in such affidavit; and in order to procure his release from the arrest thus procured, the debtor executed a note for the amount of the debt, with a surety; *Held* that the note was void as having been obtained by duress. *ib*

8. Where there is an arrest for improper purposes, without a just cause; or, where there is an arrest for a just cause, but without lawful authority; or, where there is an arrest for a just cause and under law-

ful authority, for unlawful purposes, it may be construed a duress. *ib*

9. The non-imprisonment act of 1831 does not require any written application for a warrant of arrest. None therefore is necessary; and if one be used, it need not be addressed or signed. The affidavit mentioned in section three of the act is all that is necessary. *Latham* v. *Westervelt*, 256

10. When a debtor is brought before the judge, on a warrant of arrest, no recognizance need be taken for his appearance at the adjourned day. The officer arresting him is bound to bring him before the judge, and to *keep him* in custody until he shall be duly discharged or committed. And if no recognizance is taken, he is bound to keep him in his custody; and will be answerable if he escapes. *ib*

11. An application for a warrant of arrest, under the non-imprisonment act, may be made to any judge of the court in which the suit was brought; whether the judgment has been docketed in the county of the judge's residence, or not. *ib*

12. Where the affidavit, on which an application for a warrant of arrest was founded, alleged that the defendant was justly indebted to the applicant in a specified sum, with interest since, &c., upon a judgment rendered in the supreme court, in favor of the plaintiff, against the defendant, docketed with the clerk of the county of A. on &c., for $2668.18 damages and costs, which judgment was founded on an express contract, for which the defendant could not be arrested; and among other things, that the defendant had rights in action, debts and demands which he refused to apply to the payment of the judgment: *Held* that this was a sufficient statement of facts to give the judge jurisdiction; and that it was not necessary for the plaintiff to set forth what the original cause of action was. *ib*

See DAMAGES.

ASSIGNMENT.

See DEBTOR AND CREDITOR.

ATTACHMENT.

1. Where an attachment is issued against the property of an individual as a non-resident debtor, which is served on other persons, on the ground of their having in their possession property of the defendant, and they furnish to the sheriff statements or certificates under their respective hands, denying that they have in their hands any property belonging to the defendant, the plaintiff has no right to call upon such persons to be examined, under section 286 of the code, until he impeaches the verity of the certificate. Such rights are given only in case of a *refusal* to give the certificate. *Carroll* v. *Finley*, 61

2. But if the plaintiff establishes, to the satisfaction of the judge, by the former admissions of the party, that the persons sought to be examined have property of the defendant and that the certificate stating that they have none is untrue, such conduct may be regarded as a refusal to give the required certificate, and the individuals may be examined. *ib*

ATTORNEY.

See PARTNERSHIP, 1, 2, 3.

B

BAIL.

See ARREST.

BANKS.

1. A foreign banking corporation is to be presumed to possess the power to enter into a contract with a borrower, to keep its notes in circulation, by redeeming them as they are from time to time offered for redemption. *Central Bank* v. *Empire Stone Dressing Co.* 23

2. An affidavit stating "upon information and belief" that a bank is insolvent, is not sufficient evidence to authorize the granting of an injunction and the appointment of a receiver; especially when it is in direct con-

tradiction to the regular official reports of the bank, made under oath. *Livingston* v. *Bank of New York*, 304

3. Where a suspension of specie payments by banks is general and nearly universal, the mere fact of suspension by a bank of circulation is not proof of insolvency. *ib*

4. Within the meaning of the act of 1849, a bank is clearly solvent, and consequently not to be proceeded against as insolvent, if it has property more than sufficient to satisfy all demands. *ib*

5. In such a case, where no fraud or injustice is alleged, the court will not deem it expedient to grant a temporary injunction, or an order to show cause why an injunction should not be issued; although the bank refuses to redeem its circulating notes in specie. *ib*

6. A banking or other corporation is not authorized to make an accommodation indorsement; and the same is not binding, unless it appears that the note has been discounted in good faith by the party suing thereon, in consequence of a representation made by the bank that it was its own note. *Morford* v. *Farmers' Bank of Saratoga County*, 568

7. A bank subject to the provisions of the safety fund act of April 2, 1829, is expressly restrained by the 33d section of that act from taking more than six per cent in advance on discounting paper maturing in sixty-three days; and paper discounted by a bank in violation of this section, is void in its hands. *Seneca County Bank* v. *Lamb*, 595

8. By force of the terms used, the statute prohibits, also, the making of the *contract* by or upon which a greater rate of interest than that specified is taken. Hence, although the contract is executed, so far as relates to the act of discounting, the bank will not be allowed to reap the fruits of the transaction thus prohibited, by a recovery upon the paper discounted. *ib*

9. The legislature cannot confer upon a moneyed corporation power to enact by-laws contravening, repealing, or in anywise changing the statutory or common law of the land. Hence, a provision in a bank charter, conferring upon the directors power to make and prescribe such by-laws, rules and regulations as shall be needful, touching "the *time*, *manner* and *terms* upon which discounts and deposits shall be made," will be construed as giving to the directors power to make by-laws, &c. to operate upon and control the internal conduct of the business of the bank, merely, and to restrain and direct its own officers and servants in the management of its affairs, and not to affect the public at large, or the rights and interests of third persons. *ib*

BOOKS AND PAPERS.

See CERTIORARI, 1, 2, 3.

C

CARRIERS.

1. Carriers of passengers are not obliged to carry any person without compensation, at their own risk. They have a right so far to restrict their liability, in such a case, as to contract with the passenger that he shall take his own risk, in respect to loss or damage from injuries resulting from mere negligence. *Welles* v. *New York Central Rail Road Company*, 641

2. They may contract for exemption from loss arising from the negligence of their servants or agents, and where there is a special agreement to that effect, carriers are not liable for any injuries, except such as are the result of fraudulent, willful or reckless misconduct on their part, or on the part of their officers or agents. *ib*

3. What amounts to gross negligence, or such negligence as will imply fraud or bad faith on the part of the carriers. *ib*

CASES OVERRULED, OR COMMENTED ON.

1. *Allen* v. *Patterson*, (3 *Seld.* 476,) commented on. *Chesbrough* v. *New York and Erie Rail Road Co.* 9

2. *Lott* v. *Wyckoff*, (2 *Comst.* 355,) distinguished from the present case. *Dumond* v. *Stringham*, 104

3. The decision in *Hall* v. *Nelson* (23 *Barb.* 88,) to the effect that under the constitution the county courts have no jurisdiction of a suit to foreclose a mortgage, not acquiesced in. *Benson* v. *Cromwell*, 218

CERTIFICATE OF DEPOSIT.

1. In 1853 the plaintiff deposited a sum of money with the defendants, taking from them a certificate of deposit, stating that the money was payable to his order on the return of the certificate with his indorsement thereon. In December, 1853, the partnership between the defendants was dissolved. The business was continued by B., one of the firm, who published a notice in the newspapers, that he would pay all the certificates of deposit of the late firm. There was no proof that the plaintiff ever saw, or heard of, the notice. He did not present his certificate until September, 1855, when he presented the same, and demanded payment. *Held* that the defendants were not discharged from their liability by the omission of the plaintiff to present the certificate in accordance with the notice. *Umbarger* v. *Plume*, 461

2. *Held also*, that the plaintiff could recover upon the certificate, without having previously indorsed it. *ib*

CERTIORARI.

1. Where proceedings were commenced before a judge, to compel the delivery of books and papers by a public officer, to his successor, and the judge determined that the applicant was entitled to the relief asked for, and made an order to that effect, after which a common law *certiorari* was issued, to remove the proceedings into the supreme court; *Held* that upon the service of the *certiorari* upon the judge, the proceedings before him were suspended; and that it would therefore be improper for him to issue the warrants to enforce his order. *Matter of Conover* v. *Devlin*, 426

2. A *certiorari* to remove proceedings instituted before a judge, to compel the delivery of books and papers by a public officer to his successor, will not be granted while the proceedings are still pending and undetermined. *People ex rel. Devlin* v. *Peabody*, 437

3. The allowance of a *certiorari* rests in the discretion of the court. *ib*

4. A *certiorari* to review the proceedings of the board of police in the city of New York, in removing a policeman, is the appropriate remedy for the party aggrieved. *People ex rel. Gambling* v. *Board of Police*, 481

CHECK.

1. Where debtors, in the city of New York, being pressed by their creditor, for payment, offered their certified check upon a bank in the city, at the same time proposing to the payee that it should be sent to Syracuse or Auburn to be cashed; and the check, dated one day ahead, was accepted by the creditor, upon that understanding, and was immediately sent to Auburn, where the cash was obtained upon it, and the check was returned to New York with due diligence and presented for payment at the bank upon which it was drawn, which was refused, the bank having in the mean time failed; *Held* that the drawers were liable. *Stephens* v. *McNeill*, 651

2. *Held also*, that it being a part of the arrangement that the check should be taken west to be cashed, the payee was entitled to a reasonable time for that purpose; and that all that was required of him was due diligence in getting it discounted, and having it forwarded to the city for demand of payment. That under the circumstances, the payee was not bound to present the check

for payment on the day it bore date, or on the next day thereafter. *ib*

3. Where a check is negotiable by indorsement, and after having been indorsed by the payee and another person, is sued on by the payee, his possession of it, at the trial, is presumptive evidence that the check came to his hands by delivery from the owner, and is his property. *ib*

CORPORATION.

1. A manufacturing corporation is not authorized, by virtue of its general powers, to indorse, for the accommodation of another, paper in which it is not interested; such a transaction not being within the scope of the business for which it was constituted, and in which alone it is empowered to act. Nor can it empower any officer or agent to act for it, in indorsing such paper. *Central Bank* v. *Empire Stone Dressing Company*, 23

2. The secretary of a corporation has no power to indorse accommodation paper, under his general authority to indorse notes and bills "in the prosecution of its business." *ib*

3. But if a loan, although in form made to the president of a corporation, individually, who gives his own note for the amount, indorsed by the corporation, is in fact made to the corporation itself and for its benefit; or if the lender is induced by the representations of the agent of the corporation to believe that the transaction is with the corporation and for a purpose within the scope of its business, the corporation is liable upon its indorsement. *ib*

4. An injunction and receiver will not be granted against a corporation, at the suit of a stockholder, on the ground that the company has been dissolved, and its charter annulled by a foreign government, where the decree of dissolution is not absolute, but declares that the company shall be considered in existence for certain specified purposes; and where the company has property in this state, over which the foreign government had no jurisdiction, and it appears that it will be more conducive to the interests of all the stockholders, not to disturb the existing management and arrangements of the company, and that to grant the relief asked for, would produce irreparable injury to a majority of the stockholders. *Hamilton* v. *Accessory Transit Company*, 46

5. If the decree of the foreign government, dissolving the corporation and annulling its charter, is recognized here as binding on the company and its stockholders, and by its terms the property of the company is to be seized and held subject to the order of commissioners therein appointed, to whom all right and title to the property is intended to be passed, a stockholder could not, in the courts of such foreign country, apply for a receiver, and therefore he cannot apply for a receiver here. *ib*

6. The appointment of a receiver of an insolvent corporation takes effect from the time of granting an order for a reference to appoint a receiver; and from that moment no act can be done affecting the property of the corporation, either by the corporation or its creditors. *Matter of Berry*, 55

7. The object of the statute authorizing proceedings against insolvent corporations is to take away the franchises of the corporation, and its powers of action, immediately on a petition for a receiver being filed, if the prayer of the petition be finally granted. *ib*

8. And although the receiver cannot take possession of the property of the corporation, or be deemed vested with the estate, before he is appointed, yet when his appointment is completed the estate vested in him relates back to the time of granting the order for a reference to appoint a receiver. *ib*

9. The statute of limitations is a good defense to an action brought against a foreign corporation, upon contract. *Olcott* v. *Tioga Rail Road Company*, 147

10. The exception in the statute of limitations, of cases where the debtor "shall be out of the state" when

the cause of action accrues, or shall afterwards "depart from and reside out of the state," apply only to natural persons. Corporations therefore are not embraced in the exceptions. *ib*

11. One who is a subscriber to the capital stock of a corporation, and has appeared as such on its books, and has attended meetings of the stockholders and acted as one of them, cannot when sued as a stockholder, for a debt due from the company, defend himself on the ground that although the company has been in operation for more than a year, ten per cent of the capital stock has never been paid in. *Abbott* v. *Aspinwall*, 202

12. The statute makes each stockholder liable for the debts of the company, in his individual capacity, severally, and not jointly with the others. It is not necessary, therefore, to make all the stockholders defendants to an action by a creditor of the corporation. Each creditor has a remedy against each stockholder. *ib*

13. The remedy is not against such stockholders, only, as have not paid for their stock; but it is against "stockholders," without any such restriction. The stock *held* gives the measure of the recovery; not the amount of stock unpaid for. *ib*

14. A banking or other corporation is not authorized to make an accommodation indorsement; and the same is not binding, unless it appears that the note has been discounted in good faith, by the party suing thereon, in consequence of a representation made by the bank that it was its own note. *Morford* v. *Farmers' Bank of Saratoga County*, 568

See RAIL ROAD COMPANIES.

COSTS.

See SURROGATE, 3, 4, 5.

COUNTY COURT.

The decision in *Hall* v. *Nelson*, (23 *Barb.* 88,) to the effect that under the constitution the county courts have no jurisdiction of a suit to foreclose a mortgage, not acquiesced in. *Benson* v. *Cromwell*, 218

COUNTY JUDGE.

See PRACTICE, 8.

COVENANT.

Upon a covenant by A. to pay C. all sums of money which shall be recovered in an action brought by C. against H. and wife, the covenantor is not liable, *it seems*, if the only judgment recovered in that action is for the payment of a sum of money out of the separate estate and property of the wife. *Cheesbrough* v. *Agate*, 603

D

DAMAGES.

1. For an escape from arrest on a warrant issued under the non-imprisonment act, the rule of damages is, that the sheriff is *prima facie* liable for the amount of the judgment. But if it is shown that the debtor was unable to pay his debts, the jury should be instructed to give only such damages as the plaintiff has sustained by the escape. *Latham* v. *Westervelt*, 256

2. Compensation for the actual loss sustained, is the fundamental principle upon which our law bases the allowance of damages. But it will not make such allowance upon a calculation of speculative profits; nor will it indemnify for remote or indirect losses. *Medbury* v. *New York and Erie Rail Road Co.*, 564

3. The loss must be the natural and proximate consequence of the act; and when this can be ascertained, without uncertainty, the principle of compensation will be adopted. *ib*

4. In an action to recover damages for the non-performance of a contract to transport flour from one place to another, and to deliver the same at the latter place, on or before a specified day, the measure of damages

is the difference between the contract price of the flour, had it arrived at the place of delivery on the day specified, and the price for which it was actually sold in the market, on its arrival. *ib*

5. The rule or measure of damages, in an action of trespass for taking personal property, is the actual cash market value of the property, at the time of the taking; to which interest may, generally, be added. Evidence to show for what sum the goods, at some subsequent time, were actually sold by the defendant, at public auction, is inadmissible. *Campbell* v. *Woodworth*, 648

See WASTE.

DEATH BY WRONGFUL ACT, &c.

A party who has from the public authorities a license to run a ferry, and has leased the same to another person, for a definite period, who is conducting the same independently of the lessor, by his own men and means, is not liable in damages for a death caused, during that period, by the wrongful act or negligence of a servant of the lessee. *Norton* v. *Wiswall*, 618

DEBTOR AND CREDITOR.

1. A threat by a debtor, when proposing a compromise with creditors, that if they do not accept one-third of their debt, he will make an assignment of his property, and such creditors will not get any thing—that he will put his property out of his hands—is not necessarily a threat to make a *fraudulent* disposition of his property, so as to authorize the issuing of an attachment. *Wilson* v. *Britton*, 562

2. In the absence of any proof of a fraudulent intent, derived from contemporaneous or subsequent acts, the declaration will be construed as referring to a *legal* disposition of the debtor's property. *ib*

3. A judgment creditor, by commencing supplementary proceedings against the judgment debtor under section 292 of the code, and obtaining an order for the examination of the debtor, does not acquire a prior right to, or lien upon, the equitable assets of the debtor. PRATT, J. dissented. *Voorhees* v. *Seymour*, 569

4. If, after the granting of such an order, another creditor commences a suit against the judgment debtor, to enforce an equitable lien upon the equitable assets of the debtor, by way of pledge, which suit results in a judgment establishing the lien claimed, and directing a sale of the assets for the payment of the claim, the latter suit is conclusive against the right of the creditor instituting the supplementary proceedings, and establishes, incontrovertibly, the claim of the plaintiff in the last suit, to the equitable assets of the judgment debtor; and the judgment cannot be impeached collaterally in an action brought by the creditor instituting the supplementary proceedings, and the receiver appointed therein. *ib*

5. Judgment creditors, whose executions have been returned unsatisfied, are not entitled to the benefit of a suit commenced by the judgment debtor against a third party, to set aside contracts and conveyances on the ground of usury. *Boughton* v. *Smith*, 635

6. They therefore cannot have an injunction, to restrain the judgment debtor from settling or compromising the suits so commenced by him. *ib*

DECLARATIONS.

Where the legitimacy of a person is in question, the declarations of his mother are admissible after her death, being connected with a question of pedigree; if not made *post litem motam*. *Caujolle* v. *Ferrie*, 117

DEDICATION TO THE PUBLIC.

1. To constitute a strip of land, laid out as a street, by the proprietor of a tract of land, a public highway, by force of a *dedication* for that purpose, the dedication must be *accepted* by the proper public authorities, or there must be a *user* of the

strip as a highway. *Bissell* v. *New York Central Rail Road Co.*, 630

2. The mere surveying, mapping and laying out of the tract, opening the street and selling lots upon it, does not make such street a public highway. *ib*

3. These acts are evidence of an intention to make a dedication. They import an incipient dedication, by the owner of the fee, of the strip to the public. But until the proprietor has sold the lots, or some of them, he can recall the proposed dedication; and on extinguishing the claims of any grantees to whom he may have sold lots, he can revoke the dedication at any time before the public has acquired affirmative rights by the adoption of the proposed street by some express corporate or official act, or by *user* distinct and unequivocal, of such street as a public road or highway. *ib*

4. Express acceptance by the public authorities is not requisite; nor user for a length of time sufficient to create a title by prescription. User for a short time, express and unequivocal, treating the strip of land as a street or highway, is sufficient. *ib*

DEED.

1. The true principle, deducible from all the cases, is that words in a deed which are not in form either a covenant or a condition, will be construed as either the one or the other, where, without such construction, the party has no remedy; while the leaning of the law against forfeitures always inclines the courts to call them a covenant, rather than a condition, where the remedy can be legally attained by such construction. *Aikin* v. *The Albany, Vermont and Canada Rail Road Company*, 289

2. A. and wife conveyed by deed, executed by the grantors only, to the Albany Northern Rail Road Company a right of way through A.'s farm, for the rail road of the grantees, said farm lying on both sides of the strip granted. The deed contained this clause: "the said Albany Northern Rail Road Company *is to construct and maintain* two good farm crossings over said rail road," and a passage under the same, &c. The grantees accepted the deed, had it recorded, and entered into possession of the strip of land, constructed their rail road thereon, mortgaged their rail road, franchise, &c., and became bankrupt; and on a foreclosure of the mortgage, the road, franchise, &c. were sold, and purchased by B., with notice of A.'s claim under the deed. B. sold his rights, &c. to the defendants, who entered into possession of the land granted, and were using the same for the purposes of the rail road. Neither the crossings over, nor the passage under, the rail road, were ever constructed, and by an embankment A. was cut off from all access to a portion of his farm. *Held* that the words "is to construct," imported an *obligation to construct;* and that by accepting the deed, and taking the rights under it, the grantees ratified the obligation, and in law agreed to fulfill it; the act of acceptance being as full a ratification of the agreement, and consent to its tenor, as any signing and sealing by them would have been. *ib*

3. *Held also*, that these words were to be construed as a *condition*, which would bind the land, in the hands of the defendants; and that one remedy of the grantor for a breach, if he chose to pursue it, was by reentry; but that this was not his only remedy. That as the defendants had seen fit to enter, and agree to have the land by force of the deed, they were bound to *perform the conditions* in the deed; and that a suit in equity to compel such performance would lie. *ib*

See WILL, 12.

DEVISEES.

1. Where land is devised to the children and heirs at law of the testator, after the payment of debts, if it does not appear that the devisees have taken possession of the real estate, or have accepted the devise to them, or promised to pay, or have paid, any portion of a debt owing by the testator, or sold the land or any

part of it, as heirs at law of the testator, they are not personally liable to pay the debt. *Wood* v. *Wood*, 356

2. In an action brought by a creditor, against heirs and devisees, for the recovery of a debt owing by the testator, a judgment may be entered that the plaintiff's debt be levied and made of the lands and tenements of the testator described in the complaint, notwithstanding the demand in the complaint is for a judgment against the defendants personally. *ib*

DURESS.

See ARREST.

E

EMINENT DOMAIN.

See MUNICIPAL CORPORATIONS.

EQUITY.

1. A court of equity will refuse its aid where plaintiffs seek its interposition to enforce a remedy, under circumstances which it considers unconscionable. *Broderick* v. *Smith*, 539

2. It will afford protection to a mortgagor against oppressive and unreasonable conduct on the part of the mortgagees. *ib*

EVIDENCE.

1. What evidence is sufficient, in our courts, to authorize them to infer a marriage in conformity with the French law existing at the time when the marriage is alleged to have taken place. *Caujollie* v. *Ferrie*, 177

2. Facts in a recital, so far as they are material *to give jurisdiction*, must be proved in the ordinary way. *Munro* v. *Merchant*, 383

3. Where a testator gave to his three executors, or the survivors or survivor of them, power to sell and convey his real estate, and the plaintiff claimed under a conveyance of a portion of the land, purporting to be executed by one of the executors, as survivor of the others; *Held*, that in order to prove the death of two of the executors, the plaintiff might read in evidence exemplified copies of their respective wills, and the letters of administration granted thereon, by the surrogate, as *prima facie* evidence of their deaths. *ib*

4. A certified copy of the registry of a mortgage, which was registered in pursuance of the colonial act of December 12, 1773, is not evidence of the execution of the mortgage by the mortgagor. *ib*

See DAMAGES, 5.
DECLARATIONS.
MARRIAGE, 7, 8.
PARTITION, 1 to 5.

E

EXECUTION.

See APPEAL.

EXECUTORS AND ADMINISTRATORS.

1. Where administrators employ counsel to assist them in arranging, substantiating and settling their accounts before the surrogate, on final settlement, they are personally liable to pay such counsel for their disbursements and services; and it is not in the power of such administrators to make an agreement with their counsel on which the latter can found any claim against the estate of the deceased. *Willcox* v. *Smith*, 316

2. An executor or administrator is not entitled to charge the estate with a counsel fee paid by him upon the final settlement of his accounts before the surrogate; or for drawing up his accounts in a proper and legal form, on such a settlement. Nor has the surrogate any authority to make an arbitrary allowance to him in lieu of the compensation directed by the statute to be paid to advocates and proctors in surrogates' courts, where the same is to be paid

as costs in the suit or proceeding, either by the adverse party, or out of the fund in litigation. *ib*

3. Where no sufficient excuse is given, by administrators, for not paying a note of their intestate, within eighteen months from their appointment, they should be charged personally, by the surrogate, with all interest that has accrued on it since the expiration of the eighteen months. *ib*

4. Upon the final accounting and settlement of executors or administrators, the next of kin to the deceased may set up the statute of limitations against the allowance of a claim presented by an administrator, for moneys alleged to have been paid by him upon a debt of the decedent. *ib*

5. Executors and administrators have no authority or control over the real estate left by the deceased, except to mortgage, lease or sell it for the payment of his debts, when specially authorized to do so by the surrogate. They are not warranted in paying any taxes on it, assessed subsequent to the death of the deceased, or in making payments upon mortgages, on real estate conveyed by him, or whereof he died seised, which he was under no personal obligation to pay. *ib*

6. An administrator, as such, has no right to purchase, with the funds of the estate, the interest of an individual, as next of kin, in the personal estate of the deceased, for his co-administrators, or for the heirs and next of kin; and his co-administrators have no power, even with the express consent of all the heirs and next of kin and their guardians, to authorize him to purchase, as administrator, the interests of another in either the real or the personal estate of the deceased. Nor has the surrogate power to authorize him to do it. Such a purchase is not an act which an administrator can do in his representative character. And he cannot be allowed the sum expended in making such purchase, on the settlement of his accounts. *ib*

7. The statute is imperative that every executor or administrator, in rendering his accounts to the surrogate, on a final settlement, *shall* produce vouchers for all debts and legacies paid, and for all funeral charges and just and necessary expenses. If an account can be allowed in any case, without vouchers and without proof other than the oath of the executor or administrator, where separate items of it exceed $20 in amount, *it seems* it is where creditors refuse to give vouchers; or where the executor or administrator has lost his vouchers; or where they have been stolen or destroyed, and he is unable to procure others. *ib*

8. The mode in which executors and administrators should make up their accounts. *ib*

See GUARDIAN AND WARD.
LIMITATIONS, STATUTE OF, 6, 7.
SURROGATE.

F

FORECLOSURE SUIT.

See MORTGAGE, 11, 12.

FRAUD.

Fraud is a question of fact for a jury, where there is any evidence tending to establish it. But whether the evidence tends to establish fraud, or not, is always a question of law for the court. *Erwin* v. *Voorhees*, 127

See MORTGAGE, 8, 9, 10.
VENDOR AND PURCHASER, 2.

FRAUDS, STATUTE OF.

See AGREEMENT, 5.

G

GUARDIAN AND WARD.

1. An executor or administrator who is the general guardian of an infant, cannot, of his own motion, transfer any portion of the personal estate of the deceased, in which his ward has an interest as next of kin or legatee, from himself as executor or administrator to himself as general guardian of the infant, so as to relieve himself from accounting for all of such personal estate, as execu-

tor or administrator, before the surrogate. He must keep, as executor or administrator, that portion of the estate which belongs to his ward, until he has authority from the surrogate to hold it as general guardian. *Willcox* v. *Smith*, 316

2. He cannot make any contract, as guardian, with himself as administrator, which will be binding on his ward. He cannot therefore give a receipt as guardian, to himself as administrator, which will be evidence against his ward, of the payment of the sum mentioned therein, by himself as administrator. The law will not permit him thus to act in a double capacity. *ib*

GUARANTY.

1. Upon a guaranty that "all drafts drawn by G. C. H. will be duly honored and paid by me, should he meet with any misfortune that he will not be able to do it himself," the guarantor undertakes to pay the amount of the drafts if G. C. H. shall not be able to do it himself. It is not therefore necessary for the acceptors to prove that they have exhausted their remedy against G. C. H. It is only necessary to show that the drafts were not paid when they became due. *Grant* v. *Hotchkiss*, 63

H

HABEAS CORPUS.

See ARREST.

HEIRS.

See DEVISEES.

HIGHWAYS.

See DEDICATION TO THE PUBLIC.

HOMESTEAD EXEMPTION.

1. The right of an individual filing the notice specified in the act of April 10, 1850, (*Laws of* 1850, *chap.* 260,) relative to homestead exemptions, to have his homestead protected from sale under execution, so long as he continues to occupy it, with his family, is a personal right, which he cannot convey to another by a deed of the premises, so as to enable the latter to hold the property, as against a judgment creditor of his grantor. *Allen* v. *Cook*, 374

2. Thus, where P., being the owner of a house and lot of the value of $1000, on the 27th of August, 1853, procured to be recorded in the county clerk's office a notice of his design to hold said house and lot as a homestead, under the said act of April 10, 1850, and subsequently C. recovered a judgment against him, which was docketed December 3, 1856, and on the 1st of January, 1857, while the premises were occupied by P. with his family, he conveyed the same to A. by deed; *Held* that P. had no right to sell and convey the property, so as to exempt the same, in the hands of the grantee, from levy and sale upon an execution issued on the judgment. *ib*

HUSBAND AND WIFE.

1. Although a deed from a husband to his wife is void in law, yet such a grant will be upheld in equity, when it is necessary to prevent injustice. *Simmons* v. *McElwain*, 419

2. Where the wife, in good faith, and for a valuable consideration, paid out of her separate estate, has purchased land which is conveyed to her by her husband, she obtains an equitable right to it, which a court of equity will recognize and protect. *ib*

3. Where a married woman, having a separate estate, proceeds to make improvements upon it, and for that purpose employs mechanics to furnish materials and erect a dwelling house, the debt thus contracted is her debt, and not that of the husband, and he cannot be compelled to pay it. *ib*

4. Nor will a conveyance of the property, by the wife, to her husband, carry with it an obligation to pay

her debts. The property itself may be charged in his hands, but there is no personal liability, on his part. *ib*

5. The admissions of a wife are not competent testimony, to sustain a suit against husband and wife, affecting property standing in her name. *Macondray* v. *Wardle*, 612

See WITNESS, 5, 6, 7, 8.

I

INFANT.

A promise of marriage, by an infant, is not binding, and an action for the breach thereof cannot be maintained. *Hamilton* v. *Lomax*, 615

INNKEEPER.

See ARREST.

INJUNCTION.

1. It is not every wrongful or even unconstitutional act of individuals, and still less of public bodies and municipal corporations, which will entitle the injured party to an injunction. *Blake* v. *City of Brooklyn*, 301

2. The plaintiff was the owner of certain lots of land in the city of Brooklyn, worth not over $100 each, and unsalable. The city passed an ordinance requiring these lots to be filled up to within four feet of the street grade, for a distance of 30 feet from the line of the street, in order to support the sidewalks. The plaintiff's lots were taxed $92 each, for filling and grading the street. The street ran past the lots and terminated in a *cul de sac*, at a hill 15 feet high, and the east bounds of the city. *Held* that in the absence of any allegation that the injury occasioned by the filling up of the lots would be irreparable, or that such filling up would cause any damage or injury whatever, to the lots, an injunction to forbid the filling would not lie. *ib*

3. *Held also*, that an injunction to restrain the collection of an assessment not yet laid, for the expense of such filling, ought not to be granted; it being well settled that a bill in equity and an injunction are not the proper means to review or correct such proceedings of a municipal corporation, unless they are productive of peculiar or irreparable injury, or must lead to a multiplicity of suits. The party must be left to his common law remedies, in such a case. *ib*

4. An affidavit stating "upon information and belief" that a bank is insolvent, is not sufficient evidence to authorize the granting of an injunction and the appointment of a receiver; especially when it is in direct contradiction to the regular official reports of the bank, made under oath. *Livingston* v. *Bank of New York*, 304

5. Within the meaning of the act of 1849 a bank is clearly solvent, and consequently not to be proceeded against as insolvent, if it has property more than sufficient to satisfy all demands. *ib*

6. In such a case, where no fraud or injustice is alleged, the court will not deem it expedient to grant a temporary injunction, or an order to show cause why an injunction should not be issued; although the bank refuses to redeem its circulating notes in specie. *ib*

7. Judgment creditors, whose executions have been returned unsatisfied, are not entitled to the benefit of a suit commenced by the judgment debtor against a third party, to set aside various contracts and conveyances on the ground of usury. *Boughton* v. *Smith*, 635

8. They therefore cannot have an injunction, to restrain the judgment debtor from settling or compromising the suits so commenced by him. *ib*

See CORPORATION.

J

JUDGMENT.

1. In 1847 T. obtained a judgment against B. and others, on a note

given by them to D. for about $2800. That note, as alleged, was obtained from the makers by D., by fraudulent representations, which rendered the same void; and in order to prevent an inquiry into the consideration, D., together with N. who had some interest in the note, induced T. to allow the same to be prosecuted in his name, without his having any interest in such note or judgment. The defendants in that suit did not become aware of the fraud, and the want of interest on the part of T., until after the recovery of the judgment. In 1838 T. filed a creditor's bill upon the judgment. In his answer to that bill B. set up the said fraudulent representations of D. as a defense; and after a hearing of the parties the court allowed the defense, and made a decree dismissing the bill with costs. B. then brought this suit, to have the judgment canceled of record, and for a perpetual injunction, and M. and M. his assignees, under an assignment for the benefit of creditors, joined in the suit. *Held*, on demurrer to a complaint stating these facts, that the question of fraud, having been decided in the creditor's suit, was *res adjudicata* as between B. and D., that suit having been prosecuted for the benefit of D.; and that T., the nominal plaintiff, was also bound by the decree in that suit. *Monroe* v. *Delavan*, 16

2. *Held further*, that the claim on the judgment having been, by the decree in the creditor's suit, adjudged to be liable to the defense of fraud there set up, the defendants in this suit were bound to show cause why the judgment should not be canceled. And that there had been no laches on the part of the plaintiffs in applying for relief. *ib*

3. *Held also*, that the suit was properly brought by the plaintiffs; that B. himself might bring it, he being interested in having the judgment canceled; and that his assignees might bring it, as representing the assigned property, on the title to which the judgment was a cloud, and generally as representing the rights of other creditors of B. in the fund assigned. And that it was proper for B. and his assignees to unite as plaintiffs. Demurrer overruled, and judgment for plaintiffs. *ib*

See NEW YORK, CITY OF, 5.
PRACTICE, 4, 9.

JURISDICTION.

1. The supreme court has the power to exercise such an efficient control over every proceeding in an action pending in it, as effectually to protect every person interested in the result, from injustice and fraud; and it will not allow itself to be made the instrument of wrong. *Lowber* v. *Mayor &c of New York*, 262

2. When a statute prescribes the mode of acquiring jurisdiction, the mode pointed out must be complied with, or the decision will be a nullity. *People ex rel. Gambling* v. *Board of Police*, 481

JUROR.

See JUSTICE OF THE PEACE, 4 to 7.

JUSTICE OF THE PEACE.

1. Where an action is brought, before a justice of the peace, by the assignee of the lessor in a lease in fee, against the assignee of the lessee, to recover rent, and the defendant, in his answer, denies all the allegations in the complaint, the title to land necessarily comes in question, and the justice has no jurisdiction to render a judgment. *Main* v. *Cooper*, 468

2. Where it becomes necessary for the plaintiff to establish his title, in order to recover, the objection may be taken by the defendant, that the title to land comes in question; and it is the duty of the justice, in whatever stage of the trial this shall appear, to dismiss the action. *ib*

3. Although in many cases between landlord and tenant, the latter is estopped from disputing the title of the former, yet where a stranger to the original transaction claims that he has succeeded to the rights of the landlord, it is competent for the tenant to deny his claim, and thus

put him to the proof of his title. When this is done, whatever be the amount in controversy, the case is no longer within the jurisdiction of a justice of the peace. *ib*

4. Where a person, duly summoned and returned as a juror, for the trial of an action pending before a justice of the peace, fails to appear at the trial, the justice may, after the termination of the trial, issue a summons directed to such person, requiring him to appear and show cause why he should not be fined, for his non-attendance as a juror. And if, upon personal service of such summons, such juror fails to appear on the day appointed, the justice may issue an attachment against him; and upon his being brought before the justice and failing to show any excuse for his conduct, such juror may be fined by the justice. *Robbins* v. *Gorham*, 586

5. And upon drawing up and subscribing a record of such conviction, the justice may issue an execution for the collection of the fine imposed, out of the property of the person thus proceeded against. *ib*

6. The proceedings of the justice, on hearing the case and imposing the fine, are judicial, and cannot be overhauled in an action against him, but are subject to review only by further proceedings in the same matter. *ib*

7. It is no objection to the validity of the conviction, in such a case, that the justice did not enter in his docket a minute thereof. The statute requiring such an entry to be made (2 *R. S.* 241, § 87) is merely directory. *ib*

8. The doctrine that the acceptance of rent after a forfeiture has occurred, is a waiver of the forfeiture, is one of intent; it being inferred from the payment and acceptance of rent, that both parties recognize the lease as still valid. But the contrary may be shown by express proof. *ib*

4. In 1852 M. leased certain premises in the city of New York to S., for ten years from the 1st of May, 1852, at a specified rent; with a proviso that if the rent should be in arrear, or if default should be made in any of the covenants in the lease, M. might re-enter. S. covenanted that he and his assigns would pay the rent, and such *taxes* as should be imposed or *grow due* or *payable* out of the premises. In an action by M. against an assignee of the lessee, to recover the possession because of the non-payment of the taxes for the years 1853 and 1854, it appeared that on the 15th of December, 1854, the plaintiff told the defendant that unless the taxes were paid he would eject him. The defendant promised to pay by the 1st of January, and the plaintiff gave him until that day to pay. On the 8th of February, 1855, the defendant paid, and the plaintiff accepted, the rent due on the 1st of that month; leaving the taxes unpaid. *Held* that it was to be inferred from the circumstances, that both parties understood the right of forfeiture should not be *waived* but only *suspended* until notice to the contrary should be given; and that an action to enforce the forfeiture would not lie without proof of such notice having been given. *ib*

See JUSTICE OF THE PEACE.

L

LANDLORD AND TENANT.

1. In the city of New York taxes are *due* and *payable* on the 15th of January, in each year, at which time a warrant for the collection of those remaining unpaid is issued and placed in the hands of the collector. *Manice* v. *Millen*, 41

2. A right of entry on the part of a landlord, for a forfeiture, may be suspended without being waived. *ib*

LEGITIMACY.

See MARRIAGE, 8.

LIFE INSURANCE.

1. The plaintiff insured the life of B. in the defendants' company, in the sum of $2000, for the term of life, agreeing to pay an annual premium of $97.40, on or before the 10th day of April in every year. And it was provided in the policy that in case

the plaintiff should not pay the premium on or before that day, the company should not be liable to pay the sum insured, and the policy should cease and determine. On the plaintiff's making application for insurance, the defendants' agent handed to him a pamphlet issued by the company, entitled "Prospectus" &c. which contained these clauses: "Every precaution is taken to prevent a forfeiture of policy. A party neglecting to settle his annual premium within thirty days after it is due, &c. forfeits the interest he has in the policy." The premium for the second year was not paid on the 10th day of April. B. died on the 14th of that month. After the defendants' agent had heard of B.'s illness, and on the 13th of April, the plaintiff tendered to the agent the premium, which the latter refused to receive. *Held* that the prospectus issued by the company was to be regarded as a waiver of the forfeiture incurred by the non-payment of the premium on the 10th of April; and that the defendants, after having by such prospectus induced the plaintiff to omit the payment when due, and to rest upon the assurance contained in the prospectus, of a further credit of 30 days, could not be allowed to insist upon the forfeiture as a defense, in an action upon the policy. *Ruse* v. *Mutual Benefit Life Insurance Company*, 556

2. *Held also*, that whether the prospectus was held to be a *waiver* of the forfeiture, or to *estop* the defendants from insisting on it, was immaterial; that in either view they had no defense to the suit, and the plaintiff having tendered the second year's premium within the 30 days, was entitled to recover. *ib*

3. *Held, further*, that the plaintiff's application for the insurance, which was accepted by the defendants, and in which the plaintiff stated that he had an interest in the life of B. to the full amount of $2000, was sufficient proof of such interest, as between the parties, if any proof of interest was necessary. *ib*

LIMITATION OF ESTATES.

See WILL.

LIMITATIONS, STATUTE OF.

1. The statute of limitations is a good defense to an action brought against a foreign corporation, upon contract. *Olcott* v. *Tioga Rail Road Company*, 147

2. The exceptions in the statute of limitations, of cases where the debtor "shall be out of the state" when the cause of action accrues, or shall afterwards "depart from and reside out of the state," apply only to natural persons. Corporations therefore are not embraced. *ib*

3. Under the statute of limitations, as re-enacted in the code, where a right of action had accrued previous to the code, and the debtor, after the debt became due, departed from the state, and resided out of it, for different periods during a series of years, the successive absences are to be aggregated, in computing the time for the purpose of ascertaining whether the demand is barred by the statute. The statute is not confined to the first absence after the cause of action accrues. *Berrien* v. *Wright*, 208

4. If the debtor has not been a resident of, or present in, the state of New York for the term of six years in the aggregate since the maturity of the indebtedness and before the commencement of the action, the statute is not a bar. *ib*

5. The time during which a plaintiff has been restrained by an injunction, from commencing an action, is not to be reckoned; although he has not pleaded that the injunction was served on him. It is sufficient if he had notice of it. *ib*

6. Where a note was made on the 31st of August, 1847, by which the maker promised to pay S. $1290 on demand, with interest, which remained unpaid at the death of the maker, and when letters of administration upon his estate were issued; and on the 31st of August, 1847, one of the administrators paid the interest then due on the note, and he continued to pay interest on it until 1852; *Held* that the inference was irresistible that S. presented the note to the administrators within seven

years and a half next after its date, and that they allowed it as a valid claim against the estate of the deceased. *Willcox* v. *Smith*, 316

7. *Held also*, that S.'s claim upon such note having been duly recognized and allowed by the administrators as a valid claim against the estate, within seven and a half years from the time it became due, and their final accounting and settlement having been made within six years from the time of such allowance, the next of kin could not require its rejection by the surrogate on the plea of the statute fo limitations. That under such circumstances neither they, nor the administrators, could set up the statute against the claim. *ib*

8. An action brought to reach real estate which a testator devised to the defendants, and to have the same sold, for the purpose of satisfying a debt which the testator owed to the plaintiff, is an action *in rem*, for equitable relief, of which the supreme court had not jurisdiction previous to the code; and may therefore be commenced at any time within ten years after the cause of action accrued. *Wood* v. *Wood*, 356

9. The provisions of the code, relative to the time for commencing actions, do not apply to cases where the right of action accrued prior to the time the code took effect. *ib*

10. Where, upon the dissolution of a partnership between the plaintiff and W., it was agreed between them that the plaintiff should proceed to collect the debts due to the firm, and apply the same to the payment of the debts for which each partner was solely liable, and also all debts owing by the firm; and if there should be a deficiency of debts due to the firm to pay the debts owing by them, each partner should pay one half of the deficiency, and if there should remain a surplus after making such payments, that the same should be divided between them; *Held* that the plaintiff was entitled to a reasonable time in which to collect and pay the debts; that two years and thirty-eight days was not an unreasonable time for that purpose; and that until after the expiration of such reasonable time, the one half of a deficiency owing to the plaintiff from W., under the contract, did not become due, and therefore the statute of limitations did not commence running. *ib*

LUNATICS.

1. A creditor having a claim against the estate of a lunatic, which is under the care and management of a committee, must apply to the court, by petition, to enforce his claim. He will not be allowed to commence a suit at law against the lunatic, or his estate, without the express direction or sanction of this court. *Williams* v. *Estate of Cameron*, 172

2. And even where there appears to be a right of action, yet if no particular advantage will accrue from a suit, the preference will be given to a reference under the control of the court, over an action at law. *ib*

3. Thus, where a lunatic purchased property, which he afterwards purposely injured and destroyed, before the same had been paid for, on an application by the vendors, for leave to commence an action against the committee of the lunatic for the damage done by the lunatic, the court denied the application, and referred it to a referee to take proof as to the facts and circumstances, and to report the same to the court, with his opinion thereon. *ib*

M

MANDAMUS.

1. Where the relator, as marshal appointed under the acts of March 12, and April 6, 1855, to take the census of Livingston county, presented to the board of supervisors his account against the county for fifty-nine days' services as such marshal, at $2 per day, and the board audited and allowed the same for forty days' services at $2 per day; *Held* that it was the duty of the supervisors to examine and decide as to the number of days the marshal was

actually and necessarily employed; that in such examination and decision they acted judicially, and if they committed an error it formed no ground for a writ of mandamus. *People ex rel. Baldwin* v. *Board of Supervisors of Livingston County*, 118

2. To warrant the granting of a mandamus, the applicant must have a clear legal right. *People* v. *The Croton Aqueduct Board*, 240

3. A bidder on proposals issued by the corporation of New York, for estimates, acquires no legal right or cause of action, to enforce which a mandamus will be issued, until the contract has been made with him, and approved by the common council, as provided by section 494 of the ordinance of 1849. *ib*

4. Where the Croton Aqueduct Board advertised for proposals for the construction of a new reservoir, and D. & W. made and presented an estimate or bid, which was rejected by the board, as being defective, for want of a proper verification, and the contract was awarded to a higher bidder; *Held* that a mandamus would not be granted in behalf of D. & W., requiring the Croton Aqueduct Board to *entertain and consider* their bid, and thereupon to award the contract to the lowest bidder. *ib*

5. *Held also*, that the writ could not be issued, on the application of other bidders, claiming to be the lowest bidders who had complied with the ordinance, directing the board to award the contract to the applicants, as being the lowest bidders. *ib*

MARRIAGE.

1. By the common law, to constitute a valid marriage, no ceremony, or solemnization by minister, priest or magistrate, is necessary. A marriage is complete when there is a full, free and mutual consent, by parties capable of contracting; even when not followed by cohabitation. *Caujolle* v. *Ferrie*, 177

2. The common law *presumes* marriage; that is, it presumes every man legitimate, until the contrary is shown. And suspicions, or conjectures, or rumors, are not sufficient to rebut this presumption. *ib*

3. The common law will also *infer* a contract of marriage, from circumstances; but not where the impediments of pre-contract, consanguinity, affinity, or corporal or mental incapacity exist. *ib*

4. Although these principles of the common law originated in the canon law, which at one time prevailed throughout christendom, yet in many, if not in most of the nations of the continent of Europe, a formal solemnization became necessary, to constitute a valid marriage. *ib*

5. In a country where the law requires the solemnization of a marriage, according to settled forms, in the absence of direct proof of this solemnization, it may be inferred from circumstances, as the common law allows in places where the common law prevails. *ib*

6. This rule is not restricted by any consideration of the place where the contract was made. The *lex loci*, as to the manner in which the contract should be made, will prevail; but the method of determining whether the *lex loci* was complied with, will necessarily be regulated by the *lex fori*.

7. What evidence is sufficient, in our courts, to authorize them to infer a marriage in conformity with the French law existing at the time when the marriage is alleged to have taken place. *ib*

8. Where a man and woman, residing in France, publicly avowed their intention to marry, and in consequence of his persisting in that determination the man was compelled to leave his father's house, and the woman her situation as a domestic in another family; and they formally published, as the law directed, their intention to be married at a specific time; which was followed by their living together as man and wife, in a household of their own, the woman bearing the name of the man, and being addressed and spoken of as his wife, by him and their neigh-

bors; by the birth of a child, and the performance of the rite of baptism in the presence of the putative father and members of his family; and the woman repeatedly declared that she had been married to the man, and that she was the mother, and he the father of the child; *it was held* that the proof was sufficient, after a great lapse of time, to warrant the court in pronouncing in favor of an actual and sufficient contract of marriage between the parties, previous to the birth of the child, and of the child's legitimacy. MITCHELL, P. J., dissented. *ib*

9. A promise of marriage, by an infant, is not binding, and an action for the breach thereof cannot be maintained. *Hamilton* v. *Lomax*, 615

METROPOLITAN POLICE ACT.

1. The act of April 15, 1857, establishing a metropolitan police district, provided that the mode of trial of policemen and their removal from office, should be particularly defined and prescribed by the rules of the board; and that no person should be removed except upon written charges, and after an opportunity should have been afforded him of being heard in his defense. The board adopted rules, pursuant to the act, providing that charges preferred must be in writing, sworn to, &c., unless made by a member of the board, or superintendents or inspectors, and that the accused should have two days' notice to examine the charges and make answer to them, after which a trial might be had at any meeting of the board, of which the accused had been advised. *Held* that where charges against a policeman were preferred by an individual who was not a commissioner or a superintendent or inspector, notice of the charges, and of the time and place of trial, should have been given to the accused personally. And that upon charges not sworn to, and in the absence of any proof that notice was given to the accused to call and examine the charges, and upon a notice of trial not served personally, but left at the station house, no time or place of trial being specified therein, the board had no power or authority to remove the accused. *People, ex rel. Gambling* v. *Board of Police*, 481

2. A *certiorari* to review the proceedings of the board of police, in removing a policeman, is the appropriate remedy for the party aggrieved. *ib*

3. The legislature, by the metropolitan police act of April 15, 1857, intended to continue the then existing police in office, by virtue of their appointment under the act of April 13, 1853; and such policemen became, by the mere operation of the act of April, 1857, members of the metropolitan police. *People, ex rel. McCune* v. *Board of Police*, 487

4. And where a policeman, thus continued in office by the metropolitan police act, although he refused to act under the new board of police, deeming the act of April, 1857, unconstitutional; and was unwilling and refused to act under it "until the courts should declare it constitutional," yet he continued to obey all general orders of the commissioners under the act of 1853, and, together with others acting with him, constituted the only police force of the 14th ward or precinct up to the 1st of July, 1857; *Held* that this conduct did not amount to a *resignation* of his office, but that he continued to be a member of the metropolitan police force. *ib*

5. *Held also*, that even if these acts of contumacy and refusal to act under the new organization were in themselves sufficient to constitute an intention to resign, the fact that the board of police, after the commission of such acts by the policeman, had recognized him as a member of the force, by instituting proceedings to have him dismissed for disobedience of orders, &c., and by adopting a resolution, on the 9th of October, 1857, declaring that such of the old force as had not been dismissed in conformity to law, were members of the metropolitan police, entitled to do duty, and to be paid as such, was proof that the resignation was never accepted by the board. *ib*

6. Where, on the 23d of June, 1857, charges were preferred against the relator, a member of the metropolitan police, for disobedience of orders,

and after proceedings were had thereon which were not in conformity with the 7th section of the metropolitan police act, the board of police, on the 26th of the same month, without any formal notice to the relator, proceeded to dismiss and remove him from his office, and on the same day caused a notice of such dismissal and removal to be sent to the relator, which was never received by him; *Held* that the relator was not legally dismissed from his office; and that the prceedings had, for his removal, constituted no obstacle to the relief sought, by mandamus directing the board to restore him to pay and duty. *ib*

MORTGAGE.

1 In February, 1847, G. applied to W. for a loan of $3000 upon a bond and mortgage on his farm. W., as the agent of V. who had sent money to him for investment, agreed to make the loan. There was, at the time, a mortgage upon the farm, given by P., a former owner, to H. S. P., for $2200. G. then gave his bond and mortgage to V. to secure the payment of the sum of $3000, which he received from W. less the amount of H. S. P.'s mortgage, which sum W. retained in his hands to pay the latter mortgage. The money secured by the mortgage from P. to H. S. P. was not then due, and H. S. P. refused to receive the same before it was due. W. paid H. S. P. the interest on his mortgage, from time to time, until the 2d of July, 1849, when he paid him the balance of principal and interest, with money belonging to M. in his hands to be invested for her. H. S. P. then, at the request of W., executed an assignment of the mortgage in blank, W. saying he wanted the mortgage, to raise the money again temporarily, and did not know from whom he should get the money. He afterwards filled up the blank with the name of M. as the assignee. W. died in 1851, without having applied the money of V., retained by him for that purpose out of the loan made to G., to the payment of the P. mortgage. He had, from time to time, remitted to V. the interest on the whole amount of G.'s mortgage. V. had no actual notice or knowledge of the existence of the P. mortgage, or of the facts relative to its alleged payment by W. An indorsement was made upon the bond of P., by W., stating that the bond was not to be enforced against P., but resort was only to be had to the mortgage. In November, 1850, G. and wife conveyed to the plaintiff a portion of the mortgaged premises. In March, 1852, M. having commenced a foreclosure of the P. mortgage so assigned to her, by advertisement under the statute, the plaintiff brought this action to restrain a sale of the premises under the advertisement. *Held* 1. That M. had a right to purchase the P. mortgage from H. S. P., and to take an assignment thereof for her own benefit, as an investment of her money, or otherwise, and to employ W. as her agent for that purpose; and this, although it was the duty of W., which he owed to V, and G. to pay off and discharge that mortgage, instead of keeping it on foot and causing it to be assigned. 2. That M. was not chargeable with notice of the transactions between W., V. and G., for the reason that those transactions were not connected with the subject matter of W.'s agency for her. 3. That the legal effect of the transactions between W. and H. S. P. was not a payment and satisfaction of the P. mortgage. That W. was then acting as the agent of M. and paid the money out of her funds, which he had no right to use for any other purpose than an investment for her; and that the object of his agency in her behalf would be defeated by regarding the payment in the light of a satisfaction of the mortgage. 4. That the indorsement made by W. upon the bond of P. was no evidence of the payment of either the bond or mortgage, but was, at most, only a release of the personal liability of P. 5. That the assignment of the P. mortgage to M. was valid and effectual, and the mortgage was a lien upon the premises for the full amount secured thereby, deducting the payments made thereon. 6. That the plaintiff, as the owner of a portion of the mortgaged premises, was entitled to be relieved as against the mortgage given by G. to V., to the amount due on the P. mortgage. That the agreement of W. to pay off the P. mortgage, and the retention of the money of V. by

him for that purpose, bound V. to see that mortgage discharged before the mortgage given by G. should become valid for the full amount of $3000. And that this agreement being a part of the contract of loan, V. was bound to fulfill it, and must be held responsible, as between him and G. and the plaintiff, for the fidelity of his agent. *Graves* v. *Mumford*, 94

2. Where a deed of conveyance was given by a father to his son, and a bond and mortgage executed by the latter for the purchase money, for the purpose of hindering, delaying and defrauding creditors, which bond and mortgage were subsequently sold and transferred to the plaintiff, who took the same with notice of the fraudulent object and purpose for which they were given, *it was held* that for all purposes of enforcing such bond and mortgage, or claiming any protection under them, the plaintiff stood in no better situation than the parties to the original fraudulent transaction. And that the law would lend him no aid whatever, in preserving his lien upon the premises, or in making the fraudulent securities available in any respect. *Chamberlain* v. *Barnes*, 160

3. Where the plaintiff took a mortgage from B., with full notice of a prior mortgage upon the same premises, which had been assigned to, and was then held by, C., and with knowledge that B., notwithstanding such assignment, and without the authority and sanction of C. as assignee, had executed a discharge of such prior mortgage; *Held* that the plaintiff, being a mere voluntary purchaser or mortgagee, did not occupy the position of a general creditor of B., and therefore was in no better situation to attack C.'s mortgage than was B. himself; that he stood, in this respect, in the shoes of B., and must receive the same measure of justice which would have been meted out to B. had he undertaken, by action, to legalize the fraudulent discharge and to destroy or impair the apparent lien of C.'s mortgage. *Morgan* v. *Chamberlain*, 163

4. *Also held*, that upon the principle of refusing aid to either of the parties to a fraudulent transaction, the plaintiff was not entitled to a decree declaring his mortgage to be the first lien, and the discharge of the prior mortgage to be legal. *ib*

5. It is no objection to the regularity of the proceedings in a foreclosure suit, that the place of trial was in a county other than that in which the mortgaged premises are situated; where there has been no motion or demand made to change the place first selected, and a consent to the change, or an order of the court to that effect. *Marsh* v. *Lowry*, 197

6. In such a case, after judgment, and a sale of part of the property, a purchaser cannot raise the objection that the action was not tried in the county where the mortgaged premises are situated. *ib*

7. A certified copy of the registry of a mortgage, which mortgage was registered in pursuance of the colonial act of December 12, 1773, is not evidence of the execution of the mortgage by the mortgagor. *Munro* v. *Merchant*, 383

8. A mortgagee being in possession of the mortgaged premises, after a forfeiture, is entitled to retain his possession, as against the mortgagor and those claiming under him, until his debt is paid. *ib*

9. And where there is a possession after the forfeiture, a sufficient length of time to bar an entry, such possession, it seems, will be presumed to have been under legal proceedings, or with the assent of the mortgagor. *ib*

10. A court of equity will refuse its aid where plaintiffs seek its interposition to enforce a remedy, under circumstances which it considers unconscionable. It will afford protection to a mortgagor, against oppressive and unreasonable conduct on the part of the mortgagees. *Broderick* v. *Smith*, 539

11. Thus where a bond and mortgage, given for the purchase money of land, dated June 27th, 1855, and payable on the 27th of June, 1860, with interest half yearly, contained

a provision that should any default be made in the payment of the interest when due, and the same should remain unpaid for twenty days, that then the principal sum should, at the option of the mortgagees, become payable immediately; the mortgagor, at the time of executing the mortgage, receiving from the mortgagees a written agreement that they would, within ninety days, cause a judgment which was a lien on the premises to be canceled, &c.; and the same *was* canceled, on the 31st of December, 1855, but no notice thereof was given to the mortgagor, and the latter, under the impression that the judgment was still a lien upon the premises, omitted to pay the half year's interest which was due on the 27th of December, 1855; and the twenty days mentioned in the bond having expired, without the interest being paid, or demanded, the mortgagor was, on the 24th of January, 1856, required by the mortgagees to pay the principal and interest on his bond and mortgage, they claiming the whole to be due; and the mortgagees, after refusing to accept a tender of the interest due, with interest thereon, commenced a suit to foreclose the mortgage; *Held* that the conduct of the mortgagees in attempting to enforce the forfeiture, instead of apprising the mortgagor of the discharge of the judgment, and in due time, before the expiration of the twenty days, claiming the payment of the interest, was unreasonable and oppressive, and their complaint was dismissed. SUTHERLAND, J., dissented. *ib*

MUNICIPAL CORPORATIONS.

1. Where a municipal corporation, by virtue of the power conferred by its charter, attempts to exercise the right of eminent domain, not by taking private property for public use, but by repairing, improving and fitting for a safer and more convenient public use that which has already been taken, the power to do the act—in the absence of any limitation placed thereon by the sovereign authority—necessarily includes the right of determining upon the plan and mode of doing it. No action, therefore, will lie to restrain the corporation from doing the work upon the plan adopted by it. *Ely v. City of Rochester*, 133

2. Thus where, in an action against the city of Rochester, it appeared from the complaint that the corporation was proceeding to rebuild upon a specified plan a bridge across the Genesee river, upon the same site on which a bridge had been maintained and used, as a public thoroughfare for a number of years, and the ground of the action was that the bridge, if constructed upon such plan would, when completed, cause an addition to the back water, upon the plaintiffs' mills, in periods of high water, and occasion a detention of their mills longer than would otherwise occur from that cause, and thus produce injury and damage to the plaintiffs, for an indefinite period; and that another plan might be adopted and carried out, with less prejudice to the interests of the plaintiffs; the right of the public to a passage over the river by means of a bridge, and the right of the city, in its corporate character, to construct a bridge at that point, not being questioned; and there being no pretense that the plan adopted was not in every respect suitable and proper for the bridge, so far as related to the public interests and convenience; *Held* that this was not a case in which the law gave a right of action to the plaintiffs. *ib*

3. The authority which the corporation attempts to exercise, in such a case, is of a public nature, and for the interests, necessities and convenience of the public; and being lawful in its character, all private rights and interests are to a certain extent, subordinate to it. The injury, if any, resulting to individual rights, from such acts, is *damnum absque injuria*, for which no action lies. *ib*

N

NEGLIGENCE.

See PRINCIPAL AND AGENT, 1.

NEW YORK, (CITY OF.)

1. Under section 501 of the ordinance of 1849, organizing the departments

of the corporation of the city of New York, which provides that no bid or estimate for a corporation contract shall be rejected for any error of form, provided the persons making it shall correct the same, and make it in conformity with the ordinance, within twenty-four hours after *notice* of such defect, the notice of any defect need not be in *writing*. *People, ex rel. Dinsmore* v. *Croton Aqueduct Board*, 240

2. Under section 497 of that ordinance, which requires the estimate to contain certain statements, and that it shall be verified by the oath of the *party* making the same, if an estimate is made by a partnership, the oath of *each partner* is necessary. *ib*

3. A bidder on proposals issued by the city corporation for estimates, acquires no *legal right* or cause of action, to enforce which a mandamus will be issued, until the contract has been made with him, and approved by the common council, as provided by section 494 of the ordinance of 1849. *ib*

4. As a general rule, none but the parties to an action will be allowed to meddle with its management, or will be recognized as having any standing in court in relation to it. *Lowber* v. *Mayor &c. of New York*, 262

5. But the comptroller of the city of New York, being a tax-payer and an officer of the corporation, having charge of its financial concerns, may move to have a judgment, alleged to have been recovered against the city through collusion with, and by consent of, the city officials, set aside and vacated. PEABODY, J., dissented. *ib*

6. All the provisions of the act to amend the charter of the city of New York, passed April 14, 1857, (except those made specifically applicable to the succeeding common council,) were in force on the 1st of May, 1857, and applicable to all city officers then in office. And ample provision being made by that act for the appointment of heads of departments, by the mayor and board of aldermen, the act of February 3, 1849, "to provide for filling vacancies in office," which authorizes the governor to fill vacancies in office *where no provision is made by law for filling the same*, is inapplicable to the case of a vacancy occurring in the office of one of the heads of departments, since the amended charter took effect. *People* v. *Conover*, 516

7. Accordingly, where a vacancy occurred in the office of street commissioner, by the death of the incumbent, on the 9th of June, 1857; *Held* that the mayor and board of aldermen had full power and authority to fill the said vacancy; and they having exercised that authority, by the appointment of D., as street commissioner, it was *further held* that the latter was legally appointed, and was entitled to hold the said office as against C., who had been appointed to fill the vacancy, by the governor. *ib*

8. Under the act of February 3, 1849, the governor is authorized to appoint only when a vacancy happens in an office which can be filled at an annual election. *ib*

See MANDAMUS.

O

OFFICE.

1. In order to constitute a resignation of an office, if there is no formal resignation, there must be some conduct on the part of the incumbent which is actually inconsistent with the retention of the office, and a formal acceptance of the resignation, or the appointment of another in his place, by the proper authority. *People ex rel. McCune* v. *Board of Police*, 487

2. A person resigning an office, and manifesting the resignation by an unequivocal act, may retract or withdraw it, before the same is accepted, or any act is done to fill the place thus made vacant. *ib*

See NEW YORK, (CITY OF,) 6, 7, 8.

P

PARTIES.

See APPEAL.
JUDGMENT, 2, 3.

PARTITION.

1. A party claiming lands under a partition made in pursuance of the colonial act passed January 8, 1762, must prove the regular appointment of the three commissioners specified therein. *Munro* v. *Merchant*, 383

2. A recital, in a book containing a record of the proceedings of commissioners in making partition, which states that C. Y., J. G. and T. P. were appointed commissioners by virtue of the act of January 8, 1762, "by a writing of the purport directed in and by the said act, and subscribed by W. S. jun., B. K. and P. R., *styling themselves*, in the same, three of the proprietors of the said tract of land, and which has been, according to the directions of the said act, published," &c. is not legal proof of the appointment of the commissioners. *ib*

3. Such a recital, were there no other objection to it, would be defective for not showing that the persons making the appointment were in fact "proprietors" of the land to be partitioned, or that the commissioners had any evidence that they were such. *ib*

4. The appointment of the commissioners, in the manner specified in the 7th section of the act, is requisite in order to confer any power upon them, or give them any legal existence. Their appointment is therefore a vital jurisdictional fact, a *recital* of which by the persons appointed would not be evidence, unless it was expressly made so by the act providing for it. *ib*

5. The 11th section of the act of January 8, 1762, which made "the balloting and all the proceedings" in partition, when entered in the books required, good evidence of the partition, did not make the recital of the appointment of the commissioners good evidence. *ib*

6. Any error in stating the interests and shares of the parties, in a partition suit, or any omission to state what, on motion, the plaintiff might have been compelled to insert by way of amendment, is not an irregularity which can affect the title, where the persons interested therein are all parties to the action, and are therefore concluded by the decree. *Noble* v. *Cromwell*, 475

7. A purchaser will not be discharged because of the plaintiff's omission to allege, in his complaint, that there are no other parties in interest, or incumbrancers, than those joined; nor on account of the referee's omission to annex to his report the searches for incumbrances. *ib*

8. Where a testator devised an undivided interest in real estate to a husband, in trust for his wife, during her life, and at her death to her heirs, subject to a life estate in the husband, if he survived her; *Held* that, on a partition, the proceeds of the interest so devised should be brought into court and invested, the income to be paid to the wife during her life, and to her husband after her death, if he survived her, and after his death, such proceeds to go to her heirs. *ib*

9. And the husband and wife being plaintiffs in the partition suit, and having taken judgment that their share of the proceeds should be paid over to them, instead of being so brought into court; *Held* that this was an irregularity for which the purchaser was entitled to be discharged, unless the judgment should be amended. *ib*

PARTNERSHIP.

1. Where a partnership between attorneys is dissolved after they have commenced a suit to foreclose a mortgage, and a new partnership is formed, consisting of one of the members of the old firm, and a new member, and the latter goes out of the firm and transfers his interest in the costs, before the money is collected in the foreclosure suit, the member thus retiring is not liable for the default of his former partner in not paying over the money subse-

quently received by him. *Ayrault* v. *Chamberlin*, 83

2. W. & Y., who were partners in the practice of the law, were employed by the plaintiff as his attorneys, to collect a bond and mortgage given by E., and they commenced a suit for that purpose. During its progress, the partnership was dissolved, and C. & W. formed a new partnership as the successors of W. & Y., and continued the same for several years, when it was dissolved and C. retired therefrom, W. continuing to practice as an attorney, in connection with K. Nearly a year after this dissolution, the money due upon the E. mortgage was collected and paid over to W. as the plaintiff's attorney on record. *Held* that the money having been collected long after the partnership between C. & W. had been dissolved, and the interest of C. therein had ceased, and there being no evidence of any new retainer, or any agreement to substitute C. & W. for the original attorneys, the relation of attorney and client was not subsisting in respect to that action, as between the plaintiff and C. when the money was paid to W.; and that therefore a joint action would not lie against C. & W. to recover the money so collected. *ib*

3. *Held also*, that before C. could be made liable, under such circumstances, for the default of W., it must be affirmatively shown that the new firm of C. & W. was in fact, by some agreement or understanding to which the plaintiff was a party, substituted for the old firm of W. & Y. in the foreclosure suit. *ib*

4. The admissions of one member of a firm are not evidence to show that the other persons sought to be made liable are also partners. They are only evidence against the party making them. *Kirby* v. *Hewitt*, 607

5. The plaintiffs sold goods to H., and charged them to him, and afterwards took his note in payment of the account. They then sought to charge the defendant, as being a partner of H., and relied upon the fact that there had been a partnership between them, under the firm name of H. & Co., and that no notice of the dissolution had been given to the plaintiffs, and upon the declarations of H. that the defendant was still interested with him in the business, and that the name had been changed for the purpose of collecting the debts. *Held*, that this was not sufficient to establish a liability of the defendant as a partner when the debt was contracted. *ib*

6. *Held also*, that after the partnership had been dissolved, no liability could be created upon its credit, unless the name of the firm was used in making the purchases. *ib*

7. Dealers who, after a dissolution, but without notice thereof, trust the firm, are protected; but where the name of the firm is altered, creditors cannot hold the members of a different firm liable because they have not been notified of such dissolution. *ib*

PLEADING.

1. An agreement to enter into a contract is fulfilled when the contract has been entered into by the parties, pursuant to the terms of the agreement. And if the complaint, in an action upon the original agreement, avers that the second contract was executed "in lieu" of the first, but fails to show that any important rights had intervened between the making of the two contracts, making it necessary to sue upon the first, all the allegations respecting the original agreement will be stricken out of the complaint, on motion, as being irrelevant and redundant. *Chesbrough* v. *New York and Erie Rail Road Company*, 9

2. A complaint alleging that the plaintiff, at the defendants' request, rendered to them other services, as agent, for which he is entitled to have a fair reward, fifty dollars; also for work, labor and services done, and materials furnished by the plaintiff for the defendants, is insufficient, as being indefinite and uncertain. *ib*

3. The objection to a complaint, on this ground, must be taken, not by demurrer, but by motion to strike out, or that the complaint be made more certain and definite. *ib*

POWER.

See WILL, 6, 13.

PRACTICE.

1. An application for a commission to take testimony is a *motion*, as defined in sec. 401 of the code, and must be made within the district in which the action is triable, or in a county adjoining that in which it is triable. *Erwin* v. *Voorhees*, 127

2. Accordingly, where the place of trial was the county of *Steuben*, and a commission was issued, and the interrogatories settled and allowed, by the county judge of *Onondaga* county, upon notice: *Held* that the county judge had no power to hear the application and allow the commission, and that the deposition taken under such commission was properly rejected. *ib*

3. A county judge has no power or authority to settle and allow interrogatories, to be annexed to a commission, in an action pending in the supreme court. *ib*

4. Where a defendant by his answer admits a part of the plaintiff's claim to be just, the court may on motion, under sub. 5 of sec. 244 of the code as amended in 1857, direct judgment to be given for the plaintiff for the amount of the claim admitted to be just, without prejudice to his right to proceed in the suit, for the balance claimed by him. *Duncan* v. *Ainslie*, 199

5. Objections on the ground of irregularities in practice, if intended to be urged, must be brought to the notice of the adverse party, to the end that he may have an opportunity to answer the same. *Harder* v. *Harder*, 409

6. In disposing of a motion to set aside an inquisition taken in a case of waste, the court will not consider the objections, taken on the argument, that a writ of inquiry is not a proper remedy in a case of that kind, and that the writ issued was not in proper form; where those objections were not taken in the moving papers. *ib*

7. Where a referee, upon the facts proved before him, finds the law to be that the defendant is liable; to which finding no exception is taken, the defendant cannot, upon appeal, insist that he is not liable, upon the facts appearing before the referee. *Cheesbrough* v. *Agaté*, 603

8. A case must be prepared, and settled by the referee, containing the exceptions taken during the trial, or afterwards; and if questions of law are not incorporated therein, they cannot be reviewed on appeal. *ib*

9. The court, at general term, on reversing a judgment rendered on the verdict of a jury, or on the trial by the court or a referee, cannot render a judgment in favor of the appellant. It should order a new trial. *Meyer* v. *City of Louisville*, 609

PRINCIPAL AND AGENT.

1. Where a servant of a telegraph company, in consequence of a defect in a telegraph pole, is injured by a fall therefrom while engaged in the duties of his employment, upon the pole, the company is liable for damages, upon a complaint alleging negligence and unskillfulness in the defendants in providing and using an insufficient and unsound pole, and in not having and using pike-poles and other guards and securities; although *knowledge* in the company, of the defect in the pole, is not expressly alleged. *Byron* v. *New York State Printing Telegraph Company*, 39

2. In such a case the allegation of negligence would be sustained by proving the danger arising from the defect in the pole, and that it was known to the defendants. *ib*

3. When an agent is entrusted with authority, within a prescribed sphere of action, and is permitted, from day to day, without any interference on the part of the principal, to exercise the authority, third parties will not be affected by an understanding between the principal and agent, that every act of the agent shall receive the express approval of the principal. *Medbury* v. *New York and Erie Rail Road Company*, 564

See MORTGAGE, 7.

PROMISSORY NOTES.

1. Where a promissory note was made by D. payable to W. or order, and before the delivery thereof to the payee it was indorsed by S., to enable D. to obtain credit with W. *Held* that S. was liable as indorser, to the payee, upon proof of presentment, non-payment and notice. *Waterbury* v. *Sinclair*, 455

2. *Held also*, that no indorsement by the payee was necessary, in order to perfect his rights. His rights accrued when the note was delivered to, and accepted by him, and were in no manner dependent upon any additional indorsement. *ib*

3. The rule that the payee must first indorse a note, is founded upon the fact that he alone can transfer it: when there is no transfer the reason of the rule fails, and it is therefore inapplicable. *ib*

4. Where in an action against an indorser, the complaint alleges that the defendant agreed to guaranty the payment of the note, if that allegation is not made out, it may be disregarded as surplusage. *ib*

5. Where the maker of a promissory note annexes thereto a certificate that the same is given for value, and will be paid when due, and the note is afterwards sold to a third person, for an amount less than should have been paid for it if discounted at legal interest, the maker is estopped by the certificate from setting up the defense of usury. *Chamberlain* v. *Townsend*, 611

See ARREST.

R

RAIL ROAD COMPANIES.

1. Where a laborer who has done work for a contractor, upon a rail road, has given notice of his claim, under the 12th section of the general rail road act, and has sued and recovered judgment against the company, and issued execution thereon, and the same has been returned unsatisfied, a stockholder of the company, who has paid for his stock in full, cannot be compelled to pay the amount of such judgment, under section 10 of the said act. *Gallaghar* v. *Ashby*, 143

2. The latter part of that section was designed to provide for the payment of the immediate servants, laborers and employees of the company itself, in contradistinction to the laborers employed by contractors, in the construction of the rail road; for which latter class provision is made in section 12 of the act. *ib*

3. When an agent is entrusted with authority within a prescribed sphere of action, and is permitted, from day to day, without any interference on the part of the principal, to exercise the authority, third parties will not be affected by an understanding between the principal and agent, that every act of the agent shall receive the express approval of the principal. *Medbury* v. *New York and Erie Rail Road Company*, 564

4. Where the by-laws of a rail road company entrusted the general freight agent with the power of negotiating contracts for the transportation of freight, with the approval of the president; *Held* that this restriction should be construed as meaning, subject to the approval of the president, if he, on any occasion, should deem it proper to interpose, before the attempted execution or performance of the contract. But that if he did not think fit to interpose, and neglected to apprise the public that every special contract for the transportation of freight must be ratified by him, the company would be liable for the fulfillment of the contract. *ib*

5. Where an individual is traveling upon a rail road, by virtue of a free ticket which entitles or permits him to ride in the cars of the company at his own pleasure, the ticket having an indorsement on the back thereof by which he "assumes all risk of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property" of such passenger, and he suffers an injury to his person by means of a collision between the passenger

train and a freight train left standing upon the track, the company is not liable therefor; this being a case of injury within the contemplation of the parties, and they having a *right* to stipulate for an exemption from liability under such circumstances. *Welles* v. *New York Central Rail Road Company*, 641

6. The act of May 13, 1845, "in relation to the contracts of rail road companies," had no application to rail road corporations formed under the general rail road acts of 1848 and 1850. *Rochester* v. *Barnes*, 657

7. Accordingly, where a rail road company, created under the provisions of the general rail road act of 1848, contracted a debt, for cars, in 1853, *it was held* that the directors of the company could not be made personally liable for the debt, on the ground that the same was contracted by the agency, or with the assent, of the defendants, when the company had not available means for its payment. *ib*

8. The constitution of 1846 plainly designed to abolish the former mode, or system, of creating corporations, and to adopt an entire new system, under which, by general and uniform rules, the individual liability of corporators, for all debts of their respective corporations, should be regulated and prescribed. *ib*

9. And the legislature, in passing the acts of 1848 and 1850, intended to carry out this intention of the constitution, and by those acts to prescribe the *only* rule which should govern, as to corporations formed under them, and the individual liability of their respective corporators. *ib*

10. If the act of 1845 was not wholly repealed, by the acts of 1848 and 1850, its application and operation were, by plain and necessary implication, restricted and limited to corporations previously existing. *ib*

See CARRIERS.

RECEIVER.

See CORPORATIONS, 4 to 8.

RECITAL.

See EVIDENCE.

RES ADJUDICATA.

1. The principle of *res adjudicata* is only applicable to matters directly adjudicated, and not to matters which might have arisen incidentally or collaterally. *Smith* v. *Weeks*, 463

2. It is not enough to estop a plaintiff from maintaining his action, that the matter upon which it is founded might have been available in a former suit between the same parties. *ib*

See JUDGMENT, 1.

S

SALE.

See VENDOR AND PURCHASER, 2, 5, 6.

SEDUCTION.

1. A person seduced cannot maintain an action for the seduction. *Hamilton* v. *Lomax*, 615

2. The only mode in which an action for seduction can be maintained is by bringing it in the name of some person having a right to the services of the female seduced, in which action damages may be recovered, not only for an actual loss of service, but for a sum sufficient, also, to punish the seducer. *ib*

SET-OFF.

Where a bank, at the time of its failure, was indebted to J. in the sum of $924, which was then due, and J. owed the bank $891.43 upon a note not then due, but which became due in a few days; *Held* that this was a case of *mutual credit*, and that it was the duty of the receiver of the bank, appointed under the act of 1849, (*Laws of* 1849 *ch.* 226,) to apply a sufficient amount of the sum standing to J.'s credit, on the books of the bank, to the payment and satisfaction of the amount owing to J. upon the note. *Matter of Jones* v. *Robinson*, 210

See AGREEMENT, 6.

SHERIFF.

Where a warrant is issued by a county treasurer, directed to the sheriff, commanding him to levy of the property of a town collector the amount of a tax which the collector has neglected to pay into the treasury, the sheriff, upon collecting the amount specified in the warrant, is entitled to deduct and retain, for his fees, the same per centage to which collectors are entitled; viz. five per cent. *Supervisors of Livingston County* v. *McCartney*, 90

SLAVES.

1. L., a citizen of Virginia, being the owner of eight slaves, arrived with them in a steamer, at New York, with the intention of transhipping them there for Texas, whither he was going to reside; and meaning to remain in New York only until a vessel could be procured, to continue their journey. The slaves were landed, and the next day were brought before the court by *habeas corpus*. *Held* that under the existing laws they were free, and were entitled to be discharged. *Lemmon* v. *The People, ex rel. Louis Napoleon*, 270

2. Comity does not require any state to extend any greater privileges to the citizens of another state than it grants to its own. As the state of New York does not allow its own citizens to bring a slave here, even *in transitu*, and to hold him as a slave, for any portion of time, it cannot be expected to allow the citizens of another state to do so. *Per* MITCHELL, P. J. *ib*

3. The clause of the constitution of the United States giving to congress power to regulate commerce with foreign nations and among the several states, and with the indian tribes, confers no power on congress to declare the *status* which any person shall sustain while in any state of the union. *ib*

4. This power belonged, originally, to each state, by virtue of its sovereign and independent character, and has never been surrendered. It is therefore retained by each state, and may be exercised as well in relation to persons *in transitu* as in relation to those remaining in the state. *ib*

5. The power to regulate commerce may be exercised over individuals as passengers, only while on the ocean, and until they come under state jurisdiction. It ceases when the voyage ends, and then the state laws control. *ib*

STARE DECISIS.

In the application of the principle of *stare decisis*, the supreme court should regard the decisions of the supreme court of this state at any former period as being the decisions of the same court. *Olcott* v. *The Tioga Rail Road Company*, 147

See SUPREME COURT, 2, 3.

STREET COMMISSIONER.

See NEW YORK, (CITY OF) 6, 7, 8.

SUPERVISORS.

See MANDAMUS, 1

SUPREME COURT.

1. In the application of the principle of *stare decisis*, the supreme court should regard the decisions of the supreme court of this state at any former period, as being the decisions of the same court. *Olcott* v. *The Tioga Rail Road Company*, 147

2. There should, at some time, in the supreme court, be an end of discussion, when questions decided should be deemed at rest until the decision is reversed in the court of last resort. Such, as a general rule, should be the case with all questions carefully and distinctly decided by the former supreme court, upon full argument, or by the existing court, at any general term thereof. *Per* SMITH, J. *ib*

3. There is, however, an obvious distinction between cases where the point decided was not the leading or chief point in the case; where it did not receive full discussion at the bar, or was incidentally decided, with-

out full examination, and those cases where the point in question was singly presented, fully discussed by counsel, and distinctly passed upon by the court. *Per* SMITH, J. *ib*

SUPPLEMENTARY PROCEEDINGS.

See DEBTOR AND CREDITOR, 3, 4.

SURROGATE

1. The creditors, whose debts a surrogate may direct the administrators to pay, on a final settlement of their accounts, are those whose claims arise on contracts made with the deceased; and not such as have demands against the administrators personally, by reason of agreements made between them and the administrators, even while the latter were in the proper discharge of their duties. *Willcox* v. *Smith*, 316

2. The counsel employed by administrators, to assist them on their final accounting before the surrogate, are not creditors of the deceased; nor can they make any claim against his estate for services thus rendered to the administrators. *ib*

3. Counsel, not being *parties* to proceedings before a surrogate on a final accounting, cannot have costs awarded to them; inasmuch as the statute only authorizes the surrogate to award costs to *parties*. And costs, when adjudged to a party, by the surrogate, are such, only, as were formerly allowed for similar services in the late courts of common pleas. *ib*

4. Where administrators took out letters of administration on the 1st of September, 1845, and although it was their duty to return an inventory of the personal estate within three months from that time, they had not even made oath to the accuracy of the inventory in 1852 when the next of kin commenced proceedings before the surrogate to compel them to return it; and they did not file their inventory until the 5th of January, 1853, although there was no reasonable excuse for such delay; and their oaths, which they attached to the inventory, were contradictory, and varied from the requirements of the statute; two of them swearing that S. had been the *acting* administrator and that they made their oath as to the correctness of the inventory, from the best of their knowledge, information and belief, and under the advice of counsel that the same was not conclusive upon them; and S. swearing that he had but little knowledge of the property of the deceased, previous to his appointment as administrator; that all the notes, accounts &c. appraised, and most of the personal property, were in the possession of his co-administrators, or one of them, who had been the acting administrators, and that he, S., had not been, at any time, sole acting administrator, according to his best knowledge and belief; but that he supposed, at all times, the three were acting conjointly; and that he made his affidavit under the advice of counsel, and claimed that he was not concluded by the same; and it appeared that the administrators had been remiss in collecting debts due to the deceased, in paying those contracted by him, in converting the personal property into money, and in taking vouchers for moneys paid out by them; and that they had applied some of the personal estate to uses not authorized by law, and had unnecessarily permitted the same to decrease in their hands; *Held*, that it was not a case in which the surrogate should have allowed the administrators any costs whatever, out of the estate, on the final settlement of their accounts, beyond the fees of the auditor and himself. *ib*

5. *Held also*, that the contestants were entitled to costs, to be paid out of the estate of the deceased; and that the surrogate should have awarded costs to them. *ib*

T

TAXES.

See LANDLORD AND TENANT, 1. SHERIFF.

U

USURY.

1. Where a negotiation for the sale and purchase of lands in Florida was

made in that state, but the final agreement, and the notes given for the purchase money, were executed in the state of New York, the notes being payable in Florida; *Held* that the notes were not void for usury, although interest at the rate of eight per cent was reserved. *Berrien* v. *Wright*, 208

2. When a personal contract by its terms is to be performed in another state, and the place of its performance is not chosen with any intention to evade our laws, but because that place best suits the honest intentions of the parties, our usury laws do not apply to it, although it be made and executed here. *ib*

3. Where the maker of a promissory note annexes thereto a certificate that the same is given for value, and will be paid when due, and the note is afterwards sold to a third person, for an amount less than should have been paid for it if discounted at legal interest, the maker is estopped by the certificate, from setting up the defense of usury. *Chamberlain* v. *Townsend* 611

VENDOR AND PURCHASER.

1. If goods be wrongfully taken by A., and B. afterwards comes into possession of them, the latter is deemed as much a wrongdoer as the original tortious taker; unless he establishes the fact, by proof, that he came to the possession in good faith and for a lawful purpose. In the absence of such proof no demand need be made of him. *Tallman* v. *Turck*, 167

2. This rule applies where the original taking of the goods was by permission of the owner, but the latter was led to give the permission by such a fraudulent deceit on the part of the purchaser as will avoid the sale, if the vendor chooses to avoid it. *ib*

3. Where, upon a contract between B. and C. for the exchange of real estate, C. agreed to convey his property "subject to mortgages, not to exceed $4000 on each house and lot, with interest from the 1st of May" previous, to be assumed by B. as part of the consideration money; *Held*, that this was not to be construed as limiting the undertaking of B. to mortgages *then on the property*; and that B. therefore had no right to make it an objection to the title that the original mortgages had been canceled, and others substituted in their places, payable on the 1st of November. *Benson* v. *Cromwell*, 218

4. And where B.'s counsel, after examining C.'s title, stated the objections to it, in writing, in eight different propositions, embracing special and minute objections to the proceedings in a foreclosure suit, which were supposed to be irregular; no objection being made that the court had no jurisdiction over a suit of that nature; *Held* that it was too late to raise the latter objection, for the first time, after a suit had been brought by B. to compel a specific performance, &c. *ib*

5. Where an article agreed to be sold is yet to be manufactured, the title does not pass until there has been some act on the part of the vendor which amounts to a delivery, and some act on the part of the vendee which amounts to an acceptance. *Comfort* v. *Kiersted*, 472

6. To make a sale complete, so as to vest the title in the vendee, the thing sold must not only be in existence, but it must be identified. *ib*

7. Where D. agreed to manufacture for K. a quantity of shingles, at a specified price per thousand, which shingles should *be the property of K. as fast as they were made*; *Held* that the contract conveyed no present right of property to K. in the shingles, but that, it being an agreement to be executed *in futuro*, he had only a right of action against D. for not executing the agreement. *ib*

8. *Held also*, that before the title would vest, even after the shingles were made, something must be done which would amount to at least a constructive delivery. *ib*

See ACTION, 3, 4.
WARRANTY.

W

WARRANTY.

1. Where a contract for the sale and purchase of goods is made, after the purchaser has inspected a part of the property—the whole being present at the time—and has weighed it, and a part of the purchase money is paid down, and the goods are delivered to a third person, to be by him delivered to the purchaser absolutely, on the payment of the balance of the purchase money, no action can be maintained by the purchaser—in the absence of an express warranty, and of all deceit or false representations—for a breach of warranty as to the quality of the goods. *Hotchkiss* v. *Gage*, 141

2. In this state the only case in which warranty will be implied, on the sale of goods, is upon a sale by sample. In all other cases, the rule of *caveat emptor* applies, so far as the sale rests in contract. *ib*

WASTE.

1. In an action under the code, brought by a remainderman against the tenant for life, in lieu of the former action of waste, for an intentional and malicious injury to the estate and inheritance of the plaintiff, the plaintiff alleging that such injury equals the value of the defendant's estate in the premises, and praying not only for damages, but for a forfeiture of the defendant's estate, and his eviction from the premises, upon the execution of a writ of inquiry, the amount of damages is a leading subject of inquiry. Yet, although the defendant has suffered a default, the sheriff's jury are also to inquire of the waste done, and in so doing, to designate the place wasted. *Harder* v. *Harder*, 409

2. In determining the amount of the plaintiff's damages, they are to inquire how far the acts of the defendant have injured the plaintiff's estate and inheritance. And in doing so, they are not limited to the value or market price of the wood and timber actually cut and removed. They may, and should, also consider the effect which the cutting off of the wood and timber has had upon the place alleged to be wasted. *ib*

3. The damages to the place wasted are not, necessarily and exclusively, the value of the wood and timber removed, but the solid and permanent injury to the inheritance; the tenant for life having a right to cut wood and timber for necessary repairs, and for fuel, and to clear portions of the land for cultivation. *ib*

4. If, in such an action, the plaintiff fails to prove that the injury to his estate is equal to the value of the defendant's estate, he cannot have a judgment to recover the place wasted, and treble damages. An allegation to that effect, in the complaint, will not be admitted by the default of the defendant. *ib*

WILL.

1. A will which makes a full disposition of all the testator's property is inconsistent with the valid existence of any prior will, and therefore amounts to a revocation of all wills previously executed. *Simmons* v. *Simmons*, 68

2. By a will executed previous to the adoption of the revised statutes, the testator devised certain premises to his son, in these words: "I give and bequeath to my son H. D. one hundred acres of land, off the west end of my land on lot No. 22 in the town of F., to include the improvements made by my sons D. and W. D." He also gave to H. D. the use of a certain meadow until J. should arrive at the age of 21 years, a legacy of $100, and all the testator's stock, of different kinds of cattle, which had not already been disposed of. Another part of the will contained the following clauses: "I also allow my son H. D. to give to my son J. D. common English schooling, at the expense of him, H. D." "My will also is, that if any of my heirs above mentioned should die without lawful issue, that the part willed to them should be equally divided between the surviving heirs." *Held* that the language used in devising the land to H. D. gave to him an

estate in the premises for his life only; but that the subsequent clause, by which the testator "allows" the devisee to give to J. D. common English schooling, at his own expense, imposed a personal charge upon the devisee, in respect or on account of all the provisions made by the will in favor of H. D., including the land; the effect of which was to enlarge the estate, from one for the life of the devisee, to that of a fee. *Dumond* v. *Stringham*, 104

3. *Held also*, that by the clause directing that if any of his heirs should die without lawful issue, the part willed to them should be equally divided between the surviving heirs, H. D. took a *conditional fee*, depending upon his leaving lawful issue at the time of his death; in which case such issue would take, and if he should die without issue the condition would fail, and the limitation over to the surviving heirs of the testator would be effectual by way of an *executory devise*. *ib*

4. *Held further*, that the limitation over was not void because of the remoteness of the contingency; it being apparent, from the whole scope and tenor of the will, that the testator intended, when one of his children should die without lawful issue, that his or her share should vest immediately in the survivors. *ib*

5. A testator died in 1836, leaving a widow and seven children—two sons and five daughters. After making a provision for his wife, in lieu of dower, and giving certain legacies to others, the testator, by the sixth clause of his will, gave and devised all the residue of his estate, real and personal, to his five daughters, for life, in equal portions; and upon the decease of his said daughters, respectively, leaving issue surviving, he devised to such issue the principal and the real estate in which he had before given a life estate to his, her or their mother; to have and to hold such principal and real estate to such issue, and his, her or their heirs, &c. forever, in equal portions; and in case the issue of any or either of his daughters should die before attaining the age of 21, and without leaving any issue him or her surviving, then the testator directed the share or portion of the one so dying to go to his or her surviving brothers and sisters in equal portions, and the issue of such as should then be deceased, such issue taking the same share as his, her or their parent would have taken, if living; and if either of his daughters should die without leaving issue surviving, then the remainder of the estate, both real and personal, thus allotted to such daughter, should fall into and constitute part and parcel of the residue of the testator's estate, and belong to the surviving sisters and their issue, in the manner and proportion before specified. By the seventh clause of his will, the testator directed that in case both, or either, of his sons should marry, he or they so marrying, and his or their issue, should be put upon the same footing, in all respects, in regard to his estate, both real and personal, as the daughters and their issue; and in that event the rest, residue and remainder of his estate, real and personal, should be divided into six or seven equal parts, as the case might be, and be divided and distributed among his said married son, or sons, and daughters and their respective issue, in the manner and portions directed in regard to the daughters; the shares of grandchildren not to be paid over to them before they attained the age of thirty years; they in the mean time receiving only the interest or income. The children of the testator were all of full age, and all except F. A. D. were married, and had children living. F. A. D married after the death of the testator, and died leaving a son, F. D., who was still living. *Held*, 1. That the whole sixth clause of the will was valid; and that even if the latter part of the clause were not so, its invalidity would only affect the share of a child of the testator who should die without leaving any issue, and would not impair any other share, or the devise in the previous part of the 6th clause. 2. That each of the children of the testator was entitled to an estate for life, in one equal undivided seventh part of the estate of the testator, and that the children of each child were entitled, as tenants in common, to a vested remainder in fee in said one seventh part in which their parents had a

life estate, subject to be divested in quantity by letting in after-born children, and to be divested entirely by the death of either of said grandchildren before its parent, or before reaching 21 years of age, and without leaving lawful issue him or her surviving, and leaving brothers or sisters him or her surviving. 3. That F. D., one of the grandchildren of the testator, and son of F. A. D. deceased, was entitled to an absolute estate, in his own right, in fee simple, in the one other equal undivided seventh part of the estate; the principal, however, not to be paid to him until he should attain the age of thirty years. 4. That by the terms and provisions of the will, the absolute ownership of each class of grandchildren in the respective shares in which their parent had a life estate, was only suspended during the lifetime of such parent; and that in case the issue of any or either of said children of the testator should die without leaving lawful issue, the share or portion of the one so dying would go to his or her surviving brothers and sisters in equal proportions, and the issue of such as should then be deceased, such issue taking the same share as his or her parent would have taken if living; and that a contingent remainder was thereby created, to take effect in the event that the persons to whom the first remainder was limited, should die under the age of 21 years, and without leaving lawful issue him or her surviving. 5. That the provision whereby the testator directed that the principal of the estate should not be paid over or delivered to the grandchildren until they respectively attained the age of thirty years, was a good and valid restriction. 6. That a division and partition of the real and personal estate should be made into seven equal parts or shares, upon these principles, by the executors, with power to them to sell the real estate. *Fowler* v. *Depau*, 224

6. By another clause of the same will, the executors were appointed trustees, in these words: "I hereby constitute and appoint (them) the trustees of my daughters and grandchildren, during their respective lives." *Held*, that this provision was inoperative, as to the real estate, and left the legal estate in the children and grandchildren, under § 49 of 1 *R. S.* 728. *ib*

7. The will merely "authorized and empowered" the executors to sell the real estate. It did not direct or order them to sell it; nor did it authorize the sale for any purpose of distribution, or to carry out any trust. *Held*, that this gave a mere power, to be exercised only if found convenient; that it was not imperative, and was not a power in trust; and that no beneficiary could compel a sale against the judgment or will of the executors. *ib*

8. To cause a conversion from real estate to personal, the will should decisively and definitively fix upon the land the quality of money. *ib*

9. In 1849, H. being a resident of, and domiciled at, Charleston, S. C., made his will in the presence of three witnesses, executed in the form required by the laws of South Carolina, but not according to our laws, inasmuch as he omitted to declare it to the witnesses to be his will. In the year 1854 he removed to the city of New York and died there. *Held* that the will was valid as a will of personal estate, and was properly admitted to probate as such. *Moultrie* v. *Hunt*. 252

10. As respects wills of personal estate, the place of execution is to give the law, as to the formality of execution. *ib*

11. Where, by the terms of a will, the testator gives to his children all the rest and residue of his real and personal property "*after the payment of his debts*" the debts are impliedly charged upon the estate devised; and in case of a deficiency of personal estate, there is a manifest equity in applying the real estate to the payment of debts. And it will be so applied, in an action for that purpose, brought by a creditor, against the devisee. GRAY, J., dissented. *Wood* v. *Wood*, 356

12. The sale and conveyance, by a testator, subsequent to the execution of his will, of the principal part of a farm devised therein, will operate as a revocation, not of the whole will

but only of the devise, to the extent that the testator has divested himself of the property devised. *Vandemark* v. *Vandemark*, 416

13. The proceeds of the land thus sold, if in the hands of the testator at the time of his death, will pass, with the residue of his personal estate, to the persons to whom that estate was bequeathed. *ib*

14. N., who died in 1817, by his last will and testament, gave and devised certain real estate to W. N. S. and H. O., and their heirs, and to the survivor and his heirs, in trust to pay over the rents and profits for the sole and separate use of A., the wife of J. L. S., during the joint lives of A. and her husband; and in case J. L. S. should survive A. then in trust, during his lifetime, for their children; and in the event of J. L. S. surviving his children, then upon the further trust to pay over the rents and profits to him during his life. And he gave full power and authority to J. L. S., by last will and testament, to convey and dispose of the said real estate, or any part thereof, and to limit and appoint the uses thereof in such manner as he might deem proper; and in case of his dying without having made such appointment, the land was devised to the issue of J. L. S. living at the time of his death. J. L. S. had two children, F. N. S. and R. S. On the 3d of March, 1840, a deed was executed by the trustees, of the first part, and J. L. S. and A. his wife and F. N. S. of the second part, to R. S. of the third part, by which the parties of the first and second parts conveyed to the party of the third part in fee, a portion of the said real estate. The deed also contained a covenant by which J. L. S. covenanted and agreed that he could not and would not make any disposition of the premises thereby conveyed, by any last will and testament, and that all his right, title and interest in the premises thereby conveyed, and all his beneficiary interest in the premises, was forever extinguished, relinquished and ended. J. L. S. died in 1852, leaving no issue him surviving; his sons having previously died without issue. He left a will, by which, after referring to the power contained in the will of N., he gave and devised to his wife, A., in fee, the real estate so devised in trust by N. A. subsequently conveyed the same to W. J. N., who conveyed the land to the plaintiff. *Held*, 1. That upon the death of N. the title to the land vested in the trustees during the life of J. L. S. with remainder over to his issue living at the time of his death, subject nevertheless, to the power of appointment contained in the will. That as J. L. S. left no issue living at the time of his death, the title to the premises, upon his failure to appoint, would have vested in the heirs at law of N. And that J. L. S. having made an appointment in the manner authorized by the will, upon his death the title to the premises became vested in his widow as appointee, unless by the deed of March 3, 1840, he had divested himself of the right to make such appointment. 2. That J. L. S. although the person for whose benefit the property was intended, in fact never had any beneficial interest in it. That he was therefore a stranger to the title, having no legal or equitable interest in it. And that the power conferred upon him belonged to that class styled powers *simply collateral*, a peculiarity of which class is that they can neither be barred nor extinguished by any act of the party in whom they are vested. 3. That the power of appointment given to J. L. S. was not extinguished by his executing the deed of March 3, 1840, but was properly exercised by his will, in favor of his wife. 4. That the deed executed by A., the widow of J. L. S., to W. J. N., was valid, and conveyed the premises to the grantee. 5. That A. was not estopped from taking under the will of her husband by having executed the deed of March 3, 1840; that deed operating merely to release to the grantee all the interest she then had in the land. 6. That the covenant of J. L. S. in that deed, that he could not, and would not, dispose of the premises by will, was to be regarded as a *personal*, rather than a *real* covenant;—as concerning J. L. S. personally, and not as owner of the land. That it did not affect a person claiming title to the premises under a subsequent conveyance from R. S. the son of J. L. S. *Learned* v. *Tallmadge*, 443

WITNESS.

1. Where, in an action against two persons as makers of a promissory note, the defense set up is that the note was executed under duress of imprisonment of one of the makers, and to procure his release therefrom, and was signed by the other as his surety, the principal is not a competent witness for the surety, to prove the defense; the defendants being jointly interested in the matters offered to be proved. *Strong* v. *Grannis*, 122

2. Executors and administrators, being all equally liable, *prima facie*, to creditors and the next of kin, for the property mentioned in the inventory, are not competent witnesses for each other on their final accounting before the auditor and the surrogate. *Willcox* v. *Smith*, 316

3. They are not competent witnesses for each other under the common law rules of evidence, or the statute relating to proceedings before surrogates; and the code of procedure has no application to proceedings in surrogates' courts. *ib*

4. Where administrators have given a joint bond, conditioned for the faithful performance of their trust, a surety in such bond is not a competent witness for the administrators, or either of them, on their final accounting. *ib*

5. In an action against husband and wife, to compel the application of certain real property, standing in the name of the wife, to the payment of a judgment recovered against the husband, upon the ground that it in reality belongs to the husband, and was bought in the name of the wife, in order to defraud the creditors of the husband, the wife cannot be examined as a witness by the plaintiff. *Macondray* v. *Wardle*, 612

6. The principle of the common law, forbidding husband and wife to be witnesses for each other, has not been changed by the provision of the code, allowing a party to call the adverse party as a witness. *ib*

7. The wife not being a competent witness in an action against the husband alone, making her a party to the record will not remove the incompetency. *ib*

8. Nor are the admissions of the wife competent testimony, to sustain a suit against husband and wife, affecting property standing in her name. *ib*

END OF VOLUME TWENTY-SIX.

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